The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*

*Christine A. Klein***

Recently, a remarkable shift in environmental attitudes has begun to gain traction. For example, just fifteen years ago, the Supreme Court agreed in Lucas v. South Carolina Coastal Council that coastal property was valueless in its natural condition, and that the state could not prohibit its development without providing compensation to the affected landowner. Today, the highest court in at least one state has come to the opposite conclusion, determining that the development of coastal marshlands would constitute a public nuisance under state common law. An even more striking shift is underway in the area of climate change. In early 2005, one U.S. Senator—echoing the sentiments of many—denounced the threat of catastrophic global warming as "the greatest hoax ever perpetrated on the American people." The following year, An Inconvenient Truth was released, moving Al Gore from the status of unsuccessful presidential candidate to accidental folk hero (in some quarters) and nominee for the 2007 Nobel Peace Prize. At the same time, a sizeable group of prominent business leaders began a campaign to encourage Congress to regulate their own industries by enacting mandatory caps on greenhouse gas emissions. What factors could account for this remarkable shift? The attached article suggests two responses to that question. First, as the Lucas Court set forth a new categorical rule of governmental liability for regulatory takings, it also established a new defense that draws upon the states' common law of nuisance and property. That defense has taken on a life of its own— forming what this article calls the "new nuisance doctrine"—evolving from defense, to offense, to catalyst for legislative change. Second, in 2005 Hurricanes Katrina and Rita struck New Orleans and the Gulf Coast of Louisiana and Mississippi. The hurricanes and their resultant storm surge swept away levees, life, and property. They also shattered our skepticism that wetlands indeed perform valuable flood control functions, and challenged our belief that society can continue to emit carbon dioxide and other greenhouse gases into the atmosphere without adverse impact upon the climate, weather patterns, and sea levels. As expressly contemplated by Lucas, changed circumstances and new learning should guide courts as they determine the appropriate contours, respectively, of property rights and the public interest. This article undertakes a survey of such new learning in the areas of wetland destruction, sprawling land patterns, and global warming. It concludes by considering the extent to which this new information has been incorporated into the law of new nuisance.

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* This article is comprised of 30,314 words, including abstract and footnotes.

** Associate Dean for Faculty Development and Professor of Law, University of Florida, Levin College of Law. LL.M., Columbia University; J.D., University of Colorado; B.A., Middlebury College. I am indebted to my research assistants, Heather A. Halter and Jonathan P. Huels.

INTRODUCTION: FROM NEW PROPERTY TO NEW NUISANCE

In 1992, the United States Supreme Court decided the foundational modern case on regulatory takings, Lucas v. South Carolina Coastal Council.[1] In holding that a state law forbidding construction in certain coastal zones required compensation, the Court created a new *total takings* categorical rule, requiring governments to compensate landowners whenever regulation "deprives land of all economically beneficial use."[2] Just three years earlier, Hurricane Hugo had struck the very island in dispute—the Isle of Palms—leading to thirty-five fatalities and six billion dollars in damage.[3] Drawing upon this experience, South Carolina presented evidence that undeveloped lands provide valuable protection against coastal storms and hurricanes, and that for "roughly half of the last 40 years, all or part of [the Lucas] property was part of the beach or flooded twice daily."[4] Rejecting such evidence, the Court accepted the premise that oceanfront lands are "valueless" in their natural state.[5] In so doing, the majority gave little weight to the state legislature's finding that coastal development must be regulated to prevent harm to the community. The Court reasoned, "[because] such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff."[6]

The Court tempered its new categorical rule with a new defense, planting the seed for the *new nuisance* doctrine that is the focus of this article. Under the *Lucas* defense, regulations that deprive property of all economically beneficial use "cannot be newly legislated or decreed (without compensation), but must inhere in . . . the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[7] In concurrence, Justice Kennedy provided an important reminder that nuisance law is fundamentally evolutionary, such that "changed circumstances or new knowledge may make what was previously permissible no longer so."[8] As a result, "the State should not be prevented from enacting new regulatory initiatives in response to changing conditions."[9]

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[1] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[2] *Lucas,* 505 U.S. at 1026-27.

[3] *See infra* Part II.C.

[4] *Lucas,* 505 U.S. at 1038-39 (Blackmun, J., dissenting).

[5] 505 U.S. at.1003.

[6] *Id.* at 1025 n.12.

[7] *Id.* at 1029.

[8] *Id.* at 1031 (Kennedy, J., concurring).

[9] *Id.* at 1035.

This article unpacks what I call the *new nuisance* doctrine, applying it to the environmental challenges posed by wetland destruction, sprawling development patterns, and global warming. Overall, *Lucas* triggered an unanticipated revitalization of the link between property and torts. By explicitly measuring the contours of *property* rights against the evolving backdrop of nuisance—primarily a *tort* doctrine—the Court restored an important degree of flexibility to property rights. Moreover, the *Lucas* defense weakened the insularity of property rights, instead balancing the rights of the individual against the interests of the community. This article suggests that *Lucas* initiated a revolution in the way we think about property. Such a change has not been seen, perhaps, since 1964 when Charles Reich published *The New Property*—an article that has been cited more than a thousand times by scholars and jurists.[10]

My thesis is that the new nuisance doctrine of *Lucas* has moved from defense, to offense, to legislative catalyst. As others have noted, *Lucas* left a legacy surprisingly favorable to governmental defendants in the form of a new "categorical" defense.[11] I add to this discovery by tracing the spillover effect of *Lucas* beyond the bounds of regulatory takings defense, into the realm of affirmative claims for common law nuisance. That is, as new ecological and other learning stimulated by *Lucas* begins to connect the dots between cause and effect, more aggressive nuisance claims will become viable. Even more far-reaching—as nuisance liability has become more feasible in growing areas of study such as global warming—industry leaders themselves have begun to call for uniform, federal legislation that may limit the uses to which their property can be employed.[12] These are unexpected, pro-regulatory developments, stimulated at least in part by the purportedly anti-regulatory *Lucas* decision.

Part I examines the modern property rights movement, with its emphasis upon individual rights relatively unfettered by public interest regulation. Parts II and III place the *Lucas* decision into historical context, delineating periods of roughly thirty to fifty years during which either private rights or the community welfare claimed a position of ascendancy.[13] The discussion also roots *Lucas* in a geophysical context—between the bookends of Hurricane Hugo and Hurricane Katrina. Noting the continuing vulnerability of the southeastern coastal region to severe storms, this section ponders whether the Court would decide *Lucas* differently today in light of new learning on wetlands, hurricanes, and global warming. As discussed in Part IV, after *Lucas,* nuisance law is "new" in two

[10] *See infra* Part III.C.1.

[11] *See infra* Part IV.A. (discussing the work of Professors Michael Blumm, Richard Lazarus, and others).

[12] *See infra* Part V.C.4.

[13] *See infra* Part II.

critical respects. First, it has developed from a defense to takings liability into an offensive claim for common law nuisance, and beyond to a catalyst for legislative action. Second, nuisance has a new substantive aspect. As the *Lucas* Court made clear, the doctrine should evolve in conformity with changed circumstances or new knowledge.[14] Part V considers the applicability of the new nuisance doctrine to three of the most crucial environmental problems of our time—wetland destruction, sprawling land patterns, and global warming.

I. THE PROPERTY RIGHTS IMBALANCE

> Rights are not the language of democracy. Compromise is what democracy is about. Rights are the language of freedom, and are absolute because their role is to protect our liberty. By using the absolute power of freedom to accomplish reforms of democracy, we have undermined democracy and diminished our freedom.
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> *The Death of Common Sense: How Law is Suffocating America* (1996)[15]

In a healthy society, there is a rough give-and-take between individual autonomy and community well-being. For centuries, nuisance law has been assigned the task of balancing such competing interests, weighing the common law property rights of individuals against those of the neighboring landowner or community. More recently, nuisance law has been supplemented (or even supplanted) with statutes designed to protect the public health, safety, and welfare, and the environment. Both nuisance law and public interest legislation are, at their core, enterprises involving balance and compromise.

Increasingly, however, advocates have employed the language of "rights" to lend moral heft to their side of the scale. In 1985 Professor Richard Epstein laid the groundwork for expanding the constitutional dimension of property, arguing that individual rights should be limited by a governmental police power no broader than the power of eminent domain.[16] In 1992, the United States Supreme

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[14] *Lucas,* 505 U.S. at 1003. Justice Steven's dissenting opinion expanded upon this evolutionary potential, asserting that a new appreciation of the "importance of wetlands . . . and the vulnerability of coastal lands shapes our evolving understandings of property rights." *Id.* at 1069-70 (Stevens, J., dissenting).

[15] PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 168 (1996) (condemning modern society as excessively bureaucratic and law-driven). Although the author's criticism was directed at what he perceives to be excessive governmental regulation, it might be applied with equal force to the excesses of modern property rights advocates.

[16] *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 332 (1985) (asking "what minimum of additional power . . . must be added for the state to become more than a voluntary protective association and to acquire the exclusive use of force within its territory?" and concluding that "the only additional power needed is the state's right to force exchanges of property rights [through eminent domain] that leave individuals with rights more valuable than those they have been deprived of").

Court embraced Epstein's philosophy, at least in part, in *Lucas v. South Carolina Coastal Council.*[17] Critics of Epstein and *Lucas* assert that "[n]otwithstanding the typical rhetoric of the takings debate, government officials are defenders of property rights."[18] Arguing for an evenhanded application the language of "rights." these critics contend that "[a]n aggressive use of the Takings Clause to undermine land use controls does not promote property rights generally, but rather promotes the property rights of a select few at the expense of the majority of property owners."[19]

Today, the absolutist language of rights—particularly when linked to the constitutional regulatory takings doctrine—has the potential to stifle the discussion of important social and environmental policies. As commentators have warned, unyielding "rights talk" should be used with care to avoid the suppression of democratic debate.[20] Part I surveys the modern property rights movement, highlighting the techniques it uses to shape public opinion in a manner solicitous of private landowners and distrustful of public interest regulation.[21]

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[17] Lucas v. South Carolina Coastal 505 U.S. 1003, 1015 (1992) (citing to Epstein's work for general propositions of regulatory takings law). Epstein was also one of the authors of a *Lucas* amicus brief filed on behalf of the Institute for Justice. *See* 505 U.S. at 1005. A discussion of *Lucas* appears in *infra* Part II.

[18] DOUGLAS KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 9-10 (2000), available at http://communityrights.org/legalresources/Handbook/HBintro.asp (visited Dec. 30, 2005). *See also* ELIZABETH BRUBAKER, PROPERTY RIGHTS IN THE DEFENCE OF NATURE (1995), *available at* www.uexcity.com/environmentprobe/pridon/index.html.

[19] KENDALL, *supra.*

[20] *See, e.g.,* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[21] As one who teaches Property in the law school curriculum, I must acknowledge that property professors may contribute to this distrust of governmental regulation. As another Property professor has written, the traditional "bundle of sticks" metaphor may discount the value of public interest regulation:

> One individual's interest in land cannot be defined without taking into account the interests of neighbors and the larger human and natural communities. For example, filling (or draining) a wetland might be considered a property interest belonging to the owner of tract on which it lays—a stick in his bundle. Yet in wiping out the wetland the owner affects drainage on the rest of his land—his whole bundle of sticks—and may well affect the drainage of his neighbors' lands, represented by their bundles. . . . [F]rom a social and ecological perspective, the [bundle of sticks] metaphor presents a false reality, one that cannot be squared with the values that underlie the present day understanding of what it means to own land.

Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource,* 32 ENVTL. L. 773, 775-76 (2002).

A. Supersizing Property Rights

The modern property rights movement is an important social phenomenon, and it would be little exaggeration to consider it as a manifestation of the American propensity toward "supersizing."[22] Property rights—particularly those relating to real property—have expanded in at least three important dimensions.

First, the size of homes has been increasing over time. Between 1987 and 2001, the size of the average new home in the United States increased by over 20%, from 1900 square feet to 2300 square feet.[23] By 2003, approximately 20% of new homes exceeded 3000 square feet in size.[24] Simultaneously, household size has decreased, thereby inflating the average per capita square footage of homes.[25]

Second, the profile of property owners has changed over time, increasingly including individuals with expansive property portfolios encompassing more than the traditional family home. In 2004, for example, approximately 38% of the housing stock was used for something other than the owner's principal residence.[26] Similarly, farms today may be owned by large agribusinesses, rather than by families: between 1900 and 1990, the average farm

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[22] The word "supersize" appeared in the 2003-05 edition of WEBSTER'S NEW MILLENNIUM DICTIONARY OF ENGLISH, defined as a verb meaning "to increase the size of something ordered, esp. a food item" and as an adjective meaning "extremely large; enormous." *See* WEBSTER'S NEW MILLENNIUM DICTIONARY OF ENGLISH (Barbara Ann Kipfer ed., version 0.9.6 May 5, 2005) (online edition). The word received considerable media attention when it was used in the title of Morgan Spurlock's 2004 documentary, *Super Size Me: A Film of Epic Proportions. See* A.O. Scott, *Film Review: When All Those Big Macs Bite Back,* N.Y. TIMES, May 7, 2004 (describing film as an "affable, muckraking documentary").

[23] Jennifer Evans-Cowley, *McMansions: Supersized Houses, Supersized Regulations,* TERRA GRANDE, Jan. 2005, available at http://recenter.tamu.edu (citing to 2002 study by the National Association of Home Builders).

[24] This represents an almost 100% increase in large home construction between 1988 (11% of new homes exceeded 3000 square feet) and 2003 (20% of new homes exceeded 3000 square feet). *Id.* (citing to U.S. Census Bureau data).

[25] *Id.* (citing to U.S. Census Bureau data, noting that average household size decreased from 3.11 persons in 1970 to 2.59 persons in 2000).

[26] A study by the National Association of Realtors found that the 2004 housing stock consisted of 72.1 million owner-occupied homes, 37.2 million investment units, and 6.6 million vacation homes. *See* National Association of Realtors, *Second Homes*, Mar. 9, 2005, available at http://www.realtor.org/publicaffairsweb.nsf (visited Dec. 31, 2005). Between 1985 and 1995 (and as adjusted for inflation), the amount spent on vacation homes alone (as opposed to principal residences or investment properties) rose from $6.2 billion to $13.2 billion. Zhu Xiao et al., *Second Homes: What, How Many, Where and Who,* at 2 (Joint Center for Housing Studies, Harvard University, N01-2, 2001).

grew from 147 to 461 acres, as the percentage of farmers declined from 38% to 2.6% of the national labor force.[27]

Finally, property rights have also become "supersized" in terms of political influence. Numerous advocacy groups oppose government regulation that restricts the use of private property.[28] Following the blueprint of Richard Epstein, advocates argue,

> [The] regulatory bureaucracy has become so large, unaccountable, and powerful that Congress effectively has forfeited meaningful oversight. . . . This leaves victimized private citizens, especially smaller landowners and business persons, with the near-insurmountable burden of challenging the government's intrusive land-use control in the courts.[29]

Accordingly, Epsteinian reformers promote an agenda expanding the force of property rights, thereby invalidating many modern health, safety, and environmental regulations.[30]

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[27] U.S. Dep't of Agric., *Agriculture in the Classroom, Growing a Nation: The Story of American Agriculture* (timeline), available at http://www.agclassroom.org/gan/timeline/farmers_land.htm (visited Dec. 30, 2005).

[28] Critics have dubbed as the "Takings Project" the aggressive use of the regulatory takings doctrine to oppose property regulation. *See* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far,* 25 B.C. ENVTL. AFF. L. REV. 509, 511 (1998) (identifying as "blueprint" for takings doctrine RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)). Kendall and Lord argue that the Project has been supported by an annual budget of approximately $15 million, supplied by pro-development foundations, associations, attorneys, and individuals. *See id.* at 539-45. Kendall and Lord assert that the Project's budget is dedicated, in part, to the staging of meetings, workshops, and all-expense paid seminars for judges. *See id.* at 546-50. *See also* Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223 (2005).

[29] M. David Stirling, *Move Over Saddam: Overzealous Regulators Also Threaten Freedom,* Feb. 25, 2003, available at http://www.pacificlegal.org/view_SearchDetail.asp?tid=Commentary&sField=CommentaryID&iID=77 (visited Feb. 11, 2006).

[30] Kendall & Lord, *supra* note 28.

B. Sanctifying Property Owners

> Our God-given property rights are being stolen from us little by little.
>
> The Constitution Party of Oregon[31]

The property rights movement has derived much of its force from a careful choice of rhetoric. Despite the modern "supersizing" of property rights and landowners, advocates strategically employ language that evokes the sympathetic image of small landowners as a vulnerable "David" struggling against an oppressive governmental "Goliath." At least two rhetorical techniques have been employed in an attempt to advance the position of property owners who desire to be free from government regulation.

First, property advocates sanctify landowners by linking the goal of unfettered land use to noble causes of the past. The Defenders of Property Rights, for example, compares its mission to that of the civil rights movement: "Just as segregation led to the civil rights movement in the 1960s, government intrusion on property rights—largely in the name of protecting the environment—has sparked a new crusade to protect an individual's right to use and own all forms of and interests in private property."[32] Similarly, the Washington Legal Foundation's chief legal counsel explains, "I look upon us as the bearers of the torch of the civil rights movement. . . . I see us as successors to Martin Luther King and Thurgood Marshall."[33] Other advocates search for an even higher moral ground, describing the protection of property rights in religious terms. The Constitution Party of Oregon, for example, sought to recall a state judge who had held unconstitutional a voter-approved property rights initiative, complaining that "[o]ur God-given property rights are being stolen from us little by little, and unless we take action now, there will remain little left to us but the priveledge [sic] of paying property taxes."[34]

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[31] *See* The Constitution Part of Oregon, *Petition Drive for Recall, Judge James PAC,* Nov. 9, 2005, available at http://www.constitutionpartyoregon.net (visited Dec. 9, 2005) (criticizing MacPherson v. Dep't of Admin. Serv., No. 05C10444 (Or. Cir. Ct. Marion County 2005)).

[32] Nancie G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed, in* LAND RIGHTS: THE 1990s PROPERTY RIGHTS REBELLION 24 (Bruce Yandle ed., 1995), *cited by* Kendall & Lord, *supra* note 28, at n.133. Marzulla is the founder and president of Defenders of Property Rights, an organization which describes itself as "the only national public-interest legal foundation dedicated exclusively to the protection of constitutionally guaranteed rights." *See* http://www.yourpropertyrights.org.

[33] Richard Perez-Pena, *A Rights Movement that Emerges from the Right,* N.Y. TIMES, Dec. 30, 1994 (quoting Richard Samp, chief legal counsel of the Washington Legal Foundation), *cited in* Kendall & Lord, *supra* note 28, at n.135.

[34] *See supra* note.

As a second method of sanctifying landowners, advocates employ a victimization technique, choosing particularly sympathetic landowners as clients and portraying them as martyrs for their cause. For example, the Pacific Legal Foundation ("PLF")[35] took up the appeal of an ailing widow in Suitum v. Tahoe Regional Planning Agency.[36] In its press release describing Suitum's challenge before the Supreme Court to land use regulations promulgated by the Tahoe Regional Planning Agency, the PLF referred to its client as "a wheelchair-bound old widow who is rapidly losing her sight."[37] To explain its client's twelve year delay in seeking a building permit, the PLF argued: "In 1972, John and Bernadine Suitum bought an 18,300 square foot lot in a residential subdivision in Incline Village, not far from Lake Tahoe. The only reason why hers is the last lot that has not yet been developed is because Mrs. Suitum's late husband spent the last years of his life battling illness."[38]

Similarly, in United States v. Rapanos,[39] the PLF represented a Michigan commercial developer who drained and filled wetlands without applying for the requisite federal permit under the Clean Water Act, proceeding in defiance of several federal cease and desist orders.[40] The PLF portrayed its client sympathetically, describing him as "a 70-year-old Michigan grandfather who for nearly two decades has fought overzealous government prosecutors seeking prison time and more than $10 million in fees and fines because he failed to get a federal permit before moving soil on his own property."[41]

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[35] The Pacific Legal Foundation (PLF) is a pro-development, non-profit legal foundation that has been a "leading force" in the litigation campaign for private property rights. Kendall & Lord, *supra* note 28, at 539-40. PLF terms itself a "representative in the courts for Americans who have grown weary of overregulation by big government, over-indulgence by the courts, and excessive interference in the American way of life." Pacific Legal Foundation, *About Us*, http://pacificlegal.org/PLFProfile.asp (visited Jan. 27, 2006).

[36] Suitum v. Tahoe Regional Planning Agency, 520 US. 725 (1997). The Agency's land use planning process was challenged more recently in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (rejecting claim that moratoria prohibiting virtually all development for a 32-month period constituted a categorical taking).

[37] James S. Burling, *Widow Suitum Fights a "Strange Doctrine"* (press release by PLF's Director of Property Rights), *available at* http://www.fed-soc.org/Publications/practicegroupnewsletters/ (visited Jan. 27, 2006).

[38] *Id*.

[39] Rapanos v. United States, 126 S.Ct. 2208 (2006).

[40] *Id.*

[41] Pacific Legal Foundation, *Supreme Court to Hear Landmark Wetlands Case: PLF Asks High Court to Set Wetlands Law Straight,* Oct. 11, 2005. The Sixth Circuit described Rapanos in less sympathetic terms. In observing that Rapanos had been displeased by the report of his own consultant, Dr. Goff, which found 48-58 acres of protected wetlands on one of Rapanos' commercial properties, the court noted:

The victimization technique has not been confined to individual landowners, but has been applied as well to large corporations. In attempting to portray Wal-Mart as the victim of city planning, the PLF asserted in a press release that "city officials' relentless attacks on Wal-Mart [represent] paternalistic poli[cies] that [do] nothing but deny entry-level employment opportunities to those who need them the most; an attempt to keep out basic goods at affordable prices; and an assault on the right of Wal-Mart to do business."[42] The Foundation concludes, "Free markets and freedom of choice: These American values are the true victims of this war on the Wal-Marts of this world. Consumers must . . . tell their city representatives to stop discriminating against businesses, large and small. It's the American thing to do."[43]

C. Demonizing the Public Interest

> [W]etlands regulations, like the Endangered Species Act, have been used to rob citizens of the use of millions of acres of private land.
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> *How "Wetlands" Threaten Freedom* (2006)[44]

> Upset by the report, Mr. Rapanos ordered Dr. Goff to destroy both the report and map, as well as all references to Mr. Rapanos in Dr. Goff's files. However, Dr. Goff was unwilling to do so. Mr. Rapanos stated he would "destroy" Dr. Goff if he did not comply, claiming that he would do away with the report and bulldoze the site himself, regardless of Dr. Goff's findings."

United States v. Rapanos, 376 F.3d 629, 632 (6th Cir. 2004), *vacated and remanded sub. nom* Rapanos v. United States, 126 S.Ct. 2208 (2006).

See also J. David Breemer, *The Wisdom of Growth: What Can California Learn from a Recent Property Rights Proposition in Oregon—the State Long Viewed as an Anti-Sprawl Mecca?*, SACRAMENTO BEE, Dec. 12, 2004 (PLF staff attorney criticizes local forest ordinance, complaining "[a]ll that Thomas and Doris Dodd wanted to do was build a retirement home on 40 acres of land they purchased in 1983. . . . But the county wanted the land as a forest preserve, so it passed an ordinance banning construction on the Dodd's property, destroying their American dream"). *See also Dodd v. Hood River County,* 136 F.3d 1219, 1230. (6th Cir. 1998) (denying Dodds' claim that application of zoning ordinance worked a regulatory taking, in part because landowners' six-year delay in subject construction project defeated their claim to reasonable, investment-backed expectations).

[42] Paul J. Beard II, *An Assault on Freedom* (press release by PLF staff attorney), *available at* http://www.pacificlegal.org/view_SearchDetail.asp?tid=Commentary&sField=CommentaryID&iID=140 (visited Feb. 11, 2006)..

[43] *Id.*

[44] Jane Chastain, *How "Wetlands" Threaten Freedom,* WORLDNETDAILY, June 29, 2006, *available at* http://worldnetdaily.com/news/article.asp?ARTICLE_ID=50830 (last visited Nov. 4, 2006) (describing petitioners in Rapanos v. United States, 126 S. Ct. 2208 (2006) as "modern-day freedom fighters [who fought the federal government for the right to develop land they owned in the state of Michigan]").

As a corollary to the sanctification of landowners, property advocates try to diminish the importance of the public interest. Drawing support from those who criticize "big government," advocates conflate environmental regulation with the size of government. Such rhetoric taps into the privatization movement that seeks to replace numerous government programs with private sector operations. In recent times, the call for privatization has influenced such stalwart government programs as welfare, medicare, and social security. Even the conduct of war has been privatized.[45] Supporters of both privatization and strong individual property rights distrust—and at times, even scorn—government regulation conducted in the name of the public interest.

At least two techniques promote the demonization of the public interest. First, property advocates portray the government as a bully. In *Rapanos,* for example, the Pacific Legal Foundation asserted, "Mr. Rapanos' case is about federal power, not protecting wetlands. Federal officials have been exploiting the Clean Water Act to bully and take land and money from property owners for far too long. . . ."[46] Likewise, property groups have variously criticized land use regulations as "[the embodiment of the] selfish demands of established neighborhood groups or single issue environmental constituencies"[47] and as "nothing more than an attempt to control at the federal level how and where people live, work, and travel by depriving homeowners and small businesses of choice."[48] Moreover, Wal-Mart has cast local zoning regulations affecting its stores as tantamount to Nazi book-burnings in the 1930s.[49]

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[45] *See* Greg Guma, *Privatizing War*, COMMON DREAMS NEWS CENTER, July 7, 2004 (progressive critique of privatization, alleging that "[d]uring the first Gulf War, about two percent of U.S. military personnel were private workers. As of 2003, it had reached 10 percent. The Pentagon employs more than 700,000 private contractors, and at least $33 billion of the $416 billion in military spending overwhelmingly approved by the Senate [in June 2004] will go to [private military corporations]"), available at http://www.commondreams.org/cgi-bin/print.cgi?file=/views04/0707-14.htm (visited Jan. 22, 2006). *See also* Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States,* 36 CONN. L. REV. 879 (2004).

[46] Pacific Legal Foundation, *supra* note 41 (quoting Reed Hopper, principal PLF attorney).

[47] Brief of the National Association of Home Builders and the International Council of Shopping Centers as Amici Curiae in Support of Petitioner [hereinafter, NAHB, *Lucas Brief*] at *6, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (No. 91-453), available at 1991 WL 11004084.

[48] Defenders of Property Rights, *Property Rights and "Smart Growth" Policies, available at* http://www.yourpropertyrights.org/index.asp. (criticizing "smart growth" regulations as "stifling property rights, economic development, and civil rights" and "den[ying] the dream of home ownership").

[49] In response to a ballot referendum in Flagstaff, Arizona opposing the construction of a new Wal-Mart store, the company placed an ad in the Arizona Daily Sun—featuring a photo of a 1933 Nazi book burning in Berlin—with the caption, "Should we let government tell us what we can read? . . . So why should we allow local government to limit where we shop? Or how much of a

As a second method of demonizing the public interest, property advocates employ a "no harm" technique, denying that the actions of individual landowners have adverse consequences upon the community and its natural environment. In *Suitum,* for example, the Pacific Legal Foundation complained that government regulators "never presented any evidence that there would be any environmental harm [to the Lake Tahoe Basin] if Mrs. Suitum is allowed to build the properly constructed modest retirement home of her dreams."[50] Similarly, in *Lucas,* the National Association of Home Builders ("NAHB") submitted an *amicus* brief in support of landowner/developer Lucas, denying that the development of certain coastal land would cause any harm.[51] The NAHB argued "As the united voice of the home building industry in America, the NAHB cannot let pass the central idea in the legislation before this Court, i.e., that there is something so nefarious about the building of a home that home construction can be condemned as a nuisance.[52] Although petitioner Lucas developed expensive homes in one of the nation's wealthiest communities, the NAHB portrayed his actions as both harmless and noble: "In an economic era when people find themselves compelled to seek large packing crates for shelter, there seems something oddly surreal in condemning the construction of homes as a nuisance which is so heinous that it can be prevented without any thought of compensating the landowner."[53]

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store's floor space can be used to sell groceries? . . . Choice is a freedom worth keeping." *See* Wal-Mart Watch, *Shameless: How Wal-Mart Bullies its Way into Communities Across America,* available at http://walmartwatch.com (reproducing Wal-Mart advertisement in Arizona Daily Sun, May 5, 2005).

[50] Burling, *Widow Suitum, supra* note 37. *Compare* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 307-08 (2002) (recounting how "the lake's unsurpassed beauty . . . is the wellspring of its undoing" and noting that the "upsurge of development in the area [] caused 'increased nutrient loading of the lake largely because of the impervious coverage of land in the Basin resulting from that development'").

[51] NAHB, *Lucas Brief, supra* note 47. The parties to the litigation had stipulated to the contrary. In particular, for purposes of the litigation, petitioner Lucas stipulated that the subject "beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." Lucas v. South Carolina Coastal Council, 505 U.S. at 1003, 1022 (1992) (*quoting* Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991)).

[52] NAHB, *Lucas Brief, supra* at *4.

[53] *Id.*

II. *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL:* THROUGH THE EYE OF THE HURRICANE

A. The Lucas Rule: Environmental Cynicism

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by *requiring land to be left substantially in its natural state*—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.[54]

Lucas represents one of the modern Court's most important applications of the regulatory takings doctrine. It also illustrates what this article calls *environmental cynicism,* the Court's inability to appreciate the value of undisturbed nature, and the Court's doubt that the destruction of natural landscapes through development causes measurable harm to neighboring communities. [55]

The facts of *Lucas* are straightforward: The plaintiff/petitioner, David Lucas, claimed that a South Carolina statute limiting development of his beachfront property on the Isle of Palms worked a regulatory taking for which the state owed compensation.[56] For purposes of the litigation, Lucas conceded that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm."[57] However, Lucas convinced the lower court that the challenged development restrictions had rendered his lots "valueless," a finding the Supreme Court did not disturb.[58] Under traditional regulatory takings analysis—as outlined in Penn Central Transportation Company v. City of New York—the severe economic impact to Lucas's property caused by South Carolina's regulation might be offset by the critical governmental safety objective.[59] As the *Penn Central* Court had suggested in 1978, "a 'taking' may

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[54] *Lucas,* 505 U.S. at 1018 (emphasis supplied).

[55] *See generally* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court,* 47 UCLA L.R. 703 (2000) (arguing that the Supreme Court has failed to appreciate environmental law as a distinct area of law during the past three decades).

[56] The relevant statute was the South Carolina Beachfront Management Act. *See* S.C. Code Ann. § 48-39-290(A). As applied to the Lucas property, the statute "had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels." *Lucas*, 505 U.S. at 1007.

[57] *Id.* at 1020.

[58] *Lucas,* 505 U.S. at 1006.

[59] Penn Central Transp. Company v. City of New York, 438 U.S. 104, 124 (1978) (identifying several analytical factors of "particular significance," including "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action").

more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[60] In holding for the petitioner, the *Lucas* Court declined to apply the traditional *Penn Central* analysis. Instead, the Court created a new *total takings* categorical rule, requiring governments to compensate landowners whenever regulation "deprives land of all economically beneficial use."[61]

The Isle of Palms was no ordinary community, rendering *Lucas* a tale of supersized property rights. In 2000, the area boasted a median household income 81% above the national average.[62] For his part, David Lucas was no ordinary landowner. In 1984, Lucas headed up a development partnership that purchased the Wild Dunes Beach and Racquet Club on the Isle of Palms for twenty-five million dollars.[63] The partnership, Wild Dunes Associates, developed an exclusive 1500-acre gated community that included 2500 residences and vacation homes, two golf courses, and a large marina.[64] The project made Lucas a wealthy man, generating $100 million in sales by its second year.[65] In 1986, Lucas sold off his interest in the partnership. Just months later, he re-purchased for himself two of the last undeveloped beachfront lots for the sum of $975,000. The fate of these two lots—severed from some 2500 other lots in the resort—would become the limited focus of the Supreme Court litigation.[66]

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[60] *Id*.

[61] *Lucas,* 505 U.S. at 1026-27.

[62] U.S. CENSUS BUREAU, 2000 CENSUS, *available* at http://www.epodunk.com/cgi-bin/genInfo.php?locIndex=13199 (reporting the local median household income on the Isle of Palms as $76,170 and the national median household income as $41,994).

[63] VICKI BEEN, LUCAS V. THE GREEN MACHINE: USING THE TAKINGS CLAUSE TO PROMOTE MORE EFFICIENT REGULATION*?* (2004).

[64] The golf courses were ranked among the best in the world, and the marina was one of the largest facilities in the southeastern United States. Been, *supra*, at n.22 .

[65] *Id.* at n. 23 .

[66] Some have speculated that the bifurcation of the sale and purchase transactions was a strategic decision to frame Lucas's position in more sympathetic terms, should litigation erupt:

> Although it is hard to understand why Lucas would have acquired the lots at the high end of fair market value after he had cashed in . . . , it's much easier to understand why he might want to describe his acquisition that way if attention were ever focused on the transaction. . . . [I]f one were trying to "position" the transaction for purposes of a subsequent takings lawsuit, it undoubtedly would be preferable to be seen as a "little guy" with just two lots whose value was destroyed than to be cast as a wealthy developer of more than 2500 homes, prevented from building on just two lots.

Id. at n. 34 .

The Court's environmental cynicism led it to create a new categorical rule of governmental liability, rejecting the state's argument that it had acted to mitigate serious public harm when it refused to approve Lucas' building plans. For example, South Carolina presented evidence that undeveloped lands provide valuable protection against coastal storms and hurricanes, and that for "roughly half of the last 40 years, all or part of [the Lucas] property was part of the beach or flooded twice daily."[67] In addition, petitioner Lucas conceded the validity of the statutory purpose, accepting legislative findings that an undisturbed beach/dune zone "protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner."[68] Despite such evidence, the Court accepted the premise that oceanfront lands are "valueless" in their natural state.[69] The majority dismissed as meaningless legislative findings that coastal development must be regulated to prevent harm to the community, concluding that "[because] such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff."[70]

As it announced its new rule, the Court also sowed the seeds of its destruction. The Court predicted that the rule would apply in only "extraordinary" or "relatively rare" circumstances.[71] The concurring and dissenting justices went

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[67] Justice Blackmun noted in dissent,

> The area is notoriously unstable. . . . Between 1957 and 1963, petitioner's property was under water. Between 1963 and 1973, the shoreline was 100 to 150 feet onto petitioner's property. In 1973, the first line of stable vegetation was about halfway through the property. Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dunes development [and a state agency determined that habitable structures were in imminent danger of collapse].

505 U.S. at 1038-39 (Blackmun, J., dissenting).

[68] *Lucas,* 505 U.S. at 1021.

[69] *See supra* note. The majority stated, "[w]hether Lucas's construction of single-family residences on his parcels should be described as bringing 'harm' to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that any competing adjacent use must yield." *Lucas*, 505 U.S. at 1025. *But see Lucas,* 505 U.S. at 1065 (Stevens, J., dissenting) (complaining that "the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are *developmental* uses").

[70] *Lucas,* 505 U.S. at 1025 n.12. *See also id.* at 1010 (suggesting that main legislative goals were to promote tourism and to create natural habitat, rather than to prevent development amounting to a public nuisance).

[71] *Id.* at 1016, 1018. Ten years later, the Court clarified that the *Lucas* rule applies to *permanent* regulatory takings only: "Lucas carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use."

further, doubting even that the new rule applied to the case at bar—describing the lower court's finding that the development regulation had rendered Lucas's lots valueless as "curious"[72] and "almost certainly erroneous."[73] Moreover, the Court was quick to establish a defense to its new rule. As Justice Stevens noted wryly in dissent, "Like many bright line rules, the categorical rule established in this case is only 'categorical' for a page or two in the U.S. Reports. No sooner does the Court state that 'total regulatory takings must be compensated' than it quickly establishes an exception to that rule."[74]

B. The Lucas Defense: New Nuisance as Evolutionary, Antecedent Inquiry

The Court tempered its new categorical rule with a governmental defense of apparently limited scope. Relying heavily upon judges, rather than legislators, to establish the proper balance between private rights and the public interest, the Court set forth the *new nuisance* defense that is the focus of this article:

> [Regulations that deprive property of all economically beneficial use] cannot be newly legislated or decreed (without compensation), but must inhere in . . . the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."[75]

In traditional nuisance terms the Court explained that "the owner of a lake-bed . . . for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land."[76] In dissent, Justice Blackmun chastised the Court for its elevation of longstanding *judicial* judgments above *legislative* judgments, arguing

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Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority, 535 U.S. 302, 542 n.19 (2002).

[72] *Lucas,* 505 U.S. at 1034 (Kennedy, J., concurring).

[73] *Lucas,* 505 U.S. at 1043-44 (Blackmun, J., dissenting).

[74] *Lucas,* 505 U.S. at 1066 (Stevens, J., dissenting).

[75] *Lucas,* 505 U.S. at 1029.

[76] *Id.* at 1029.

"[t]here is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislators do today."[77]

The Court added two brief qualifications to its new defense that would prove to be surprisingly beneficial to future government defendants.[78] First, the Court explained that to resist compensation, the state must demonstrate that "the logically *antecedent inquiry* into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[79] This reference to an "antecedent inquiry" would develop into an important affirmative defense for government litigants.[80] Moreover, Justice Kennedy's concurrence provided an important reminder that nuisance law is fundamentally *evolutionary*, such that "changed circumstances or new knowledge may make what was previously permissible no longer so."[81] As a result, "the State should not be prevented from enacting new regulatory initiatives in response to changing conditions."[82]

C. The Lucas Bookends: From Hurricane Hugo to Hurricane Katrina

By viewing *Lucas* through the lens of the region's recurrent experience with hurricanes, this section brings the Court's environmental cynicism into sharp focus. From Hurricane Hugo (1989) to Hurricane Katrina (2005) and beyond, the southeastern United States has been pummeled repeatedly by coastal storms and hurricanes. The site of *Lucas*—the Isle of Palms, South Carolina—was particularly vulnerable. As a barrier island, the area was "notoriously unstable."[83] As defined by one South Carolina state agency, barrier islands are "tidewater landforms that protect the mainland from the effects of sea storms, [and] are characterized by an ever-changing beach, sand dunes, maritime forest and salt marsh."[84]

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[77] *Id.* at 1054 (Blackmun, J., dissenting).

[78] *See* Michael C. Blumm, Lucas's *Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defense,* 29 HARV. ENVTL. L. REV. 321, 322 (2005).

[79] *Lucas,* 505 U.S. at 1027 (emphasis added).

[80] *See infra* notes and accompanying text.

[81] *Lucas,* 505 U.S. at 1031 (Kennedy, J., concurring).

[82] *Id.* at 1035.

[83] *See supra* note.

[84] South Carolina Dep't of Parks, Recreation & Tourism, *Discover Carolina: Life and Death of a Barrier Island—Vocabulary List,* available at http://www.discovercarolina.com/html/s05nature104a01e.html (last visited Feb. 4, 2007).

Prior to the 1992 decision in *Lucas,* South Carolina had a long history as a target of deadly storms, including significant activity in 1893, 1916, 1940, 1954 ("Hurricane Hazel"), 1959 ("Hurricane Gracie"), and 1989 ("Hurricane Hugo").[85] Just three years prior to the Court's decision in *Lucas,* Hurricane Hugo had struck the very island in dispute—the Isle of Palms—leading to thirty-five fatalities and six billion dollars in damage.[86] Despite the seriousness of these storms, only the dissenting Justices in *Lucas* would have upheld the application of South Carolina's protective legislation. Drawing from "the hard lessons of experience,"[87] Justice Stevens found that the state's argument that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes" had "much science on its side."[88] Likewise, dissenting Justice Blackmun argued that "uncontrolled beachfront development can cause serious damage to life and property" by "destroy[ing] the natural sand dune barriers that provide storm breaks."[89] He worried that "beachfront buildings are not only themselves destroyed [by hurricanes], 'but they are often driven, like battering rams, into adjacent inland homes.'"[90]

After *Lucas,* the storm pattern continued, both in South Carolina and in the broader southeastern region of the United States. Less than one month after the Court decided *Lucas,* Hurricane Andrew made landfall along the Gulf Coast of Louisiana and Florida, leading to forty deaths and thirty billion dollars in property damage.[91] Subsequent years witnessed additional deadly storms. In 2004, nine tropical storms caused over forty-two billion dollars in damage, more than one hundred deaths along the Atlantic coast of the United States, and some three

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[85] SOUTH CAROLINA CLIMATE OFFICE PUBLICATIONS, HURRICANES, *South Carolina Hurricane Facts, available at* http://www.dnr.sc.gov/climate/schurr_pub.html (visited Mar. 6, 2006).

[86] *Id.*

[87] Respondent's Brief on Writ of Certiorari to the Supreme Court of the State of South Carolina, at *31, *available at* 1992 WL 672613 (1992) (arguing that legislative policies regulating coastal development "are not based upon abstract conclusions that building on barrier islands like the Isle of Palms is dangerous to life and property and significantly damaging to the fragile beach/dune system").

[88] *Lucas,* 505 U.S. at 1075 (Stevens, J., dissenting).

[89] *Lucas,* 505 U.S. at 1037 (Blackmun, J., dissenting) (drawing lessons from 29 deaths and $6 billion in property damage caused by Hurricane Hugo in 1989).

[90] *Id*.

[91] *After the Storm: Hurricane Andrew Ten Years Later*, ST. PETERSBURG TIMES, *available at* http://www.sptimes/2002/webspecials02/andrew/ (describing hurricane's path across south Florida and Louisiana).

thousand deaths in Haiti.[92] The 2005 storm season would be even more severe for the United States, when Hurricanes Katrina and Rita struck the Gulf coast on August 29 and September 24, respectively. Causing a storm surge of twenty-nine feet, Katrina flooded approximately eighty percent of the city of New Orleans, all of St. Bernard Parish, and sections of two other parishes.[93] The storm resulted in the death of 1,420 people and caused $75 billion dollars in damage.[94] Hurricane Rita, the fourth most intense Atlantic hurricane ever recorded, caused some ten billion dollars in damage.[95]

Although analysis is ongoing, several lessons have emerged from these disasters.[96] First, wetlands are valuable resources that moderate the impacts of coastal storms and hurricanes. The General Accounting Office likens wetlands to "speed bump[s], slowing down storms almost as dry land does."[97] Although not free from dispute, there is evidence that that every 2.7 linear miles of coastal wetlands can reduce the height of storm surges by one foot.[98] Second, "natural" disasters such as hurricanes can be exacerbated by human activity. For example, Louisiana and other Gulf States were rendered increasingly vulnerable to hurricanes as coastal wetlands were destroyed. The Congressional Research Service reports that "[i]t is now believed that more than 1.2 million acres [of Gulf

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[92] National Climatic Data Center, *Climate of 2004: Atlantic Hurricane Season,* Dec. 13, 2004, *available at* http://www.ncdc.noaa.gov/oa/climate/research/2004/hurricanes04.html (visited Mar. 6, 2006).

[93] Wikipedia, *Hurricane Katrina*, *available at* http://en.wikipedia.org/wiki/Hurricane Katrina (visited Mar. 6, 2006).

[94] *Id.*

[95] Wikipedia, *Hurricane Rita, available at* http://en.wikipedia.org/wiki/Hurricane_Rita (visited Aug. 23, 2006).

[96] For a compilation of information about Louisiana's coastal wetlands derived from experts in the field and sponsored by the "America's Wetland" campaign, *see* http://www.americaswetlandresources.com/.

[97] GAO, *Hurricane Katrina: Providing Oversight of the Nation's Preparedness, Response, and Recovery Activities,* at *7, Sept. 28, 2005 (GAO-05-1053T Hurricane Katrina) (noting that wetlands, "once regarded as unimportant areas to be filled or drained . . . are now recognized for [a] variety of important functions . . . including providing flood control by slowing down and absorbing excess water during storms . . . and protecting coastal and upland areas from erosion").

[98] Bob Sullivan, *Wetlands Erosion Raises Hurricane Risks,* MSNBS, Aug. 29, 2005 (quoting Sidney Coffee, executive assistant to the governor for coastal activities); Louisiana Sea Grant, *Louisiana Hurricane Recovery Resources, available at* http://www.laseagrant.org/hurricane/wetlands.htm (quoting Rex Caffey, Louisiana Sea Grant College Program, Louisiana State University Ag Center for the proposition that "[a]t a minimum, we can say that the net loss of 1.2 million acres of coastal wetlands has definitely increased the vulnerability and exposure of Louisiana's critical coastal infrastructure").

Coast] wetlands, an area approximately the size of Delaware, has been converted to open water since the 1930s."[99]

In light of these "changed circumstances" and "new knowledge," would the Court decide *Lucas* differently today?[100] Some evidence suggests a negative response, indicating that the Supreme Court remains skeptical that wetlands function as natural flood control systems, at least in the context of non-coastal, interior wetlands.[101] Despite the Supreme Court's continued environmental cynicism, state courts and the lower federal courts appear more willing to incorporate new learning into their background principles of property law and nuisance.[102]

III. PROPERTY RIGHTS REFORM: *LUCAS* IN HISTORICAL CONTEXT

> And so, my fellow Americans: ask not what your country can do for you—ask what you can do for your country.
>
> President John F. Kennedy (1961)[103]

> [W]e must be clear about our purposes. The aim here is efficiency, not austerity. . . . Conservation may be a sign of personal virtue, but it is not a sufficient basis all by itself for sound, comprehensive energy policy.
>
> Vice President Dick Cheney (2001)[104]

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[99] Jeffrey Zinn, *Hurricanes Katrina and Rita and the Coastal Louisiana Ecosystem Restoration,* at *2, CONG. RESEARCH SERVICE (RS22276), Sept. 26, 2005.

[100] In a different environmental context, the Court has changed course in light of new learning about the danger of certain methods of coal extraction. *Compare* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (holding Kohler Act worked a regulatory taking, despite asserted public safety purpose of preventing mine-induced subsidence) and Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding state mining regulation does not work a regulatory taking, despite its striking similarity to the Kohler Act). *See also See also* M&J Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (holding that subsidence control plan was not a taking under *Lucas* nuisance defense); Department of Environmental Protection (Pennsylvania), *A Homeowner's Guide to Mine Subsidence, available at* http://www.dep.state.pa.us/MSIHomeowners/ (visited Mar. 6, 2006).

[101] *See* Rapanos v. United States, 126 S.Ct. 2208 (2006).

[102] *See infra* Part IV.

[103] John F. Kennedy, *Inaugural Address,* Jan. 20, 1961.

[104] Vice President Dick Cheney, Apr. 30, 2001 (remarks at the annual meeting of the Associated Press, Toronto, Ontario), available at http://www.whitehouse.gov/vicepresident/news-speeches/speeches/print/vp20010430.html (visited Feb. 5, 2006).

Society has long struggled to achieve a balance between individual autonomy and the welfare of the community. From the perspective of the individual, this represents a search for balance between rights and responsibilities, and between personal freedom and sacrifice for the commonwealth. From the perspective of political theory, this represents a tension between the visions of government as laissez-faire-protector-of-vested-rights, and government as public-interest-regulator. As discussed in Part I, property advocates have undertaken a highly-organized campaign over the past few decades to win public support for stronger individual rights, fewer individual responsibilities, and weaker governmental regulation.

This section places the autonomy/community, rights/responsibilities tension into historical context, noting cycles during which one or the other of the competing philosophies has claimed a position of ascendancy. As a broad generalization, the discussion identifies the following dominant paradigms of the twentieth century: individualism (1900-1933); communitarianism (1933-81); and individualism (1981-2000). This section concludes by observing signs of a return to the spirit of community responsibility, coinciding roughly with the end of both the twentieth century and the Rehnquist Court.[105]

A. The Industrial Revolution: Promoting Individual Rights

The rise of the modern industrialized world has dramatically changed the quality of life, in both positive and negative ways. The first wave of the industrial revolution occurred in Great Britain at the end of the 18th century. By the end of the 19th century, a "second" industrial revolution was occurring in the United States.[106] Overall, the industrialization of the United States spawned a rational, but perhaps over-exuberant embrace of economic and industrial growth, often at the expense of other social values. "Property rights" were of paramount value during this time, even if the rights holder was a vast industry or corporation, rather than an identifiable human being. Popular culture reinforced this preference for autonomy and rights over community and responsibility. For example, the "flapper" society of the 1920s drew support from "the popular contempt for prohibition" and from a "widespread disdain for authority."[107]

Many judges of the early twentieth century embraced the new economic and social order with unquestioning faith in the virtue of "progress," zealously

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[105] *See infra* Part III.D. William H. Rehnquist was Chief Justice from September 26, 1986 to September 3, 2005. Supreme Court of the United States, *Members of the Supreme Court of the United States,* available at http://www.supremecourtus.gov (visited Aug. 2, 2006).

[106] *See* MSN Encarta, *Industrial Revolution, available at* http://Encarta.msn.com/text_761577952__0/Industrial_Revolution.html (visited Jan. 22, 2006).

[107] *See* Wikipedia, *Flapper* (entry in online encyclopedia), *available at* http://en.wikipedia.org/wiki/ (visited July 30, 2006).

protecting individual property and autonomy through substantive due process analysis. As illustrated by the now-discredited decision in Lochner v. New York,[108] the Supreme Court then looked with distrust upon public interest legislation designed to protect the health, safety, and welfare of laborers by limiting the rights of industrial employers.[109]

The case of the developing railroads presents another example of judicial solicitude for the maintenance of an industry relatively unfettered by governmental regulation. In articulating the well-known "stop, look, and listen" rule for railroad crossings, Justice Holmes' 1927 observation serves as a metaphor for the march of progress: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train not the train stop for him."[110]

B. The New Deal and the Great Society: Promoting Community Welfare

> The Government cannot get along without you [community leaders]. The Federal, State, local Governments can't. The whole period we are going through will come back in the end to individual citizens, to individual responsibility, to private organization, through the years to come.
>
> President Franklin D. Roosevelt (1933)[111]

> [The Great Society] is a place where the city of man serves not only the needs of the body and the demands of commerce but the desire for beauty and the hunger for community.
>
> President Lyndon B. Johnson (1964) [112]

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[108] Lochner v. New York, 198 U.S. 45 (1905) (reversing conviction of bakery owner for violating labor safety law setting maximum hours for New York bakers), *overruled in part by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

[109] The Court indicated little interest in upholding laws "pertaining to the health of the individual engaged in the occupation of a baker," particularly where such laws might hinder economic productivity. *Lochner, supra* at 57 (concluding that"[clean] and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week"). *But see id.* at 70 (Harlan, J., dissenting) (claiming that bakery work was then notoriously difficult, involving "a great deal of physical exertion in an overheated workshop," the "constant inhaling of flour dust," and a reduced life span).

[110] Baltimore & O. Railroad Co. v. Goodman, 275 U.S. 66, 69-70 (1927) (Holmes, J.) (reversing judgment for estate of deceased automobile driver and establishing the rule that travelers must "stop, look, and listen" before crossing the tracks).

[111] President Franklin D. Roosevelt, *An Extemporaneous Address Before the 1933 Conference on Mobilization for Human Needs,* Sept. 8, 1933, available at http://newdeal.feri.org/speeches/1933h.htm.

As industrialization became more widespread, so also did its abuses. As a reaction to the excesses of the first wave of industrialization, the common law of negligence and nuisance evolved as remedies for torts, both direct and indirect.[113] By the end of the nineteenth century, the great leaders of industry—heading powerful railroad, steel, oil, and tobacco corporations—would be simultaneously revered as "captains of industry" and scorned as "robber barons."[114] As an antidote to the latter, beginning with the Sherman Antitrust Act of 1890, Congress began to pass legislation to protect the public from anticompetitive behavior.[115]

After the stock market crash of 1929, Congress turned its legislative attention to the restoration of the nation's economic and social wellbeing. During the so-called New Deal era of the 1930s during the presidency of Franklin Delano Roosevelt, Congress passed a host of new public interest legislation, including the Social Security Act of 1935[116] and the Fair Labor Standards Act of 1938.[117]

President Roosevelt's social legislation continued during the 1960s, as President Lyndon B. Johnson's "Great Society" program sought to bring an end to poverty and racial injustice.[118] Johnson's initiative led to the passage of the Civil Rights Act of 1964,[119] the Voting Rights Bill of 1965,[120] and the creation of

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[112] President Lyndon B. Johnson, *Remarks at the University of Michigan*, May 22, 1964, available at http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/640522.asp (visited Feb. 18, 2006).

[113] PROSSER AND KEETON ON THE LAW OF TORTS (W. Page Keeton, general ed.) (5th ed. 1984). The authors observe that the rise of nuisance during the first half of the 19th century in England "coincided in a marked degree with the Industrial Revolution; and it very probably was stimulated by the rapid increase in the number of accidents caused by industrial machinery, and in particular by the invention of railways." *Id.* at 161.

[114] *See generally,* Wikipedia, *Gilded Age* (entry in online encyclopedia), *available at* http://en.wikipedia.org/wiki/Gilded_Age (visited July 30, 2006).

[115] The Sherman Antitrust Act of 1890, 26 Stat. 209 (codified as amended at 15 U.S.C. § 2 *et seq.*). *See also* Valentine, *supra* (describing the Sherman Act as a congressional response to a "popular outcry" against the robber barons).

[116] Social Security Act of 1935, 49 Stat. 620 (codified as amended at 42 U.S.C. § 301 et seq.). *See generally,* SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY: A BRIEF HISTORY, *available at* www.socialsecurity.gov/history.

[117] Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et. seq.* At first, during the so-called Lochner era, the courts struck down many of these public interest statutes under substantive due process review designed to protect economic and property rights. *See* Lochner v. New York, 198 U.S. 45 (1905).

[118] *See generally,* The White House, *President George W. Bush, History & Tours,* available at http://www.whitehouse.gov/history/presidents/lj36.html.

[119] 42 U.S.C. § 2000e.

Medicare,[121] Medicaid,[122] Head Start,[123] the Job Corps,[124] and the Community Action Program.[125] Overall, the period from roughly 1933-1981 witnessed the formation of the modern welfare state. During this time, there was an increasing appreciation for the role of the federal government as an agent to promote and protect the public interest.

C. From New Property to New Nuisance: The Return of Individual Rights

Two influential scholars of the twentieth century—Charles Reich and Richard Epstein—used the language of individual "rights" in framing impassioned pleas for social reform. Both feared the power of the majority to impose its will upon lone individuals. But beyond the common call for increased rights, their philosophies diverged. Following on the heels of the New Deal and roughly contemporaneous with the Great Society era, Reich's scholarship on the "new property" emphasized the community's responsibility to ensure that all its members enjoyed at least the basic necessities of life.[126] Epstein's writings, in contrast, mark an historical shift from the philosophy of communitarianism to that of individualism.[127] His work—which resonated with the Reagan era's antipathy toward governmental regulation[128]—formed the intellectual blueprint for the modern property rights movement.[129] Epstein's views influenced the Supreme Court, most notably in *Lucas v. South Carolina Coastal Council,*[130]where the Court limited the permissible scope of uncompensated government regulation in certain cases to a seemingly narrow "new nuisance" defense.[131]

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[120] Pub. L. No. 89-110, 79 Stat. 437.

[121] *See* Medicare Act, 79 Stat. 290 (codified as amended at 42 U.S.C. § 1395 *et seq.*).

[122] 42 U.S.C. § 1396 *et seq.* (Title XIX of the Social Security Act).

[123] 42 U.S.C. § 9831 *et seq.*

[124] 42 U.S.C. § 2701 *et seq.* (Economic Opportunity Act of 1964, establishing *inter alia*, the Job Corps).

[125] 42 U.S.C. § 2808(a) (repealed by 95 Stat. 519).

[126] Reich's work is considered in *infra* Part III.C.1.

[127] Epstein's work is considered in *infra* Part III.C.2.

[128] Ronald Reagan, president from 1981-89, sought to reduce reliance upon government. *See generally*, http://www.whitehouse.gov/history/presidents/rr40.html (visited Aug. 2, 2006).

[129] *See supra* notes and accompanying text.

[130] *See supra* notes and accompanying text.

[131] *Lucas* is considered in *supra* Part II.

1. The New Property

> As we move toward a welfare state, largess will be an ever more important form of wealth. And largess is a vital link in the relationship between the government and private sides of society. It is necessary, then, that largess begin to do the work of property.
>
> Charles Reich (1964)[132]

During the contagious optimism and idealism of the Great Society era, Charles Reich wrote *The New Property*.[133] From his 1964 vantage point, Reich attempted to describe the emerging "new society."[134] He focused particularly upon government *largesse*—forms of wealth dispensed by the government to its citizens, including income, benefits, jobs, occupational licenses, franchises, contracts, subsidies, and services.[135] Reich observed that these new government benefits were "steadily taking the place of traditional forms of wealth—forms which are held as private property."[136] But Reich worried that these new benefits failed to incorporate sufficient safeguards for their recipients. Instead, he feared, the government had broad discretion to withdraw these intangible rights at any time.[137] Reich accepted that the new "public interest state" was part of a "great and necessary movement for reform."[138] He saw the "revised social contract" as a government promise to protect its citizens from "the extremes of economic dislocation."[139] And he acknowledged that there was no turning back.[140] Overall,

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[132] Charles A. Reich, *The New Property,* 73 YALE L.J. 733, 778 (1964). *See also* Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor* (hereinafter, *The New Economic Order*), 71 CHI.-KENT L. REV. 817 (1996) (asserting that "in a centrally managed economy, such as we have today, the due process clause gives every person in America a constitutional right to minimum subsistence and housing, to child care, education, employment, health insurance, retirement, and to a clean and healthy natural environment").

[133] Reich, *The New Property, supra* at 733.

[134] *Id*.

[135] *Id.* at 734-37.

[136] *Id.* at 733.

[137] *Id.* at 738. Reich noted that "wealth that flows from the government is held by its recipients conditionally, subject to confiscation in the interest of the paramount state," a result that "resembles the philosophy of feudal tenure." *Id.* at 768-69.

[138] *Id.* at 771.

[139] Reich, *The New Economic Order, supra* note 132, at 817.

[140] Reich wrote, "There can be no retreat from the public interest state. It is the inevitable outgrowth of an interdependent world. An effort to return to an earlier economic order would merely transfer power to giant private governments which would rule not in the public interest, but in their own interest." Reich, *The New Property, supra* note 132, at 778.

however, Reich asserted that the "public interest" had been grossly misinterpreted, thereby distorting the high purposes of the reforms of the New Deal and the New Society.[141]

To compensate for the insecurity of benefits provided by the emerging welfare state, Reich proposed a solution cloaked in the language of rights and property. He argued not for the abolition of government welfare programs, but instead that individual entitlements under such programs should receive the protections enjoyed by private property.[142] In sum, he argued that the conception of government benefits should move from largess to right. Reich more fully developed his views in three subsequent articles: *Beyond the New Property: An Ecological View of Due Process* (1990);[143] *The Liberty Impact of the New Property* (1990);[144] and *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor* (1996).[145]

As an initial matter, there may appear to be an alignment of interests between Reich and the modern-day property rights movement. From this perspective, *The New Property* might be a precursor to the writings of Epstein and other property rights advocates.[146] At least three facets of Reich's writing, however, belie this preliminary impression. First, Reich tempered his concern for private property with a firm underpinning of instrumentalism. He was—first and foremost—a champion of society's weakest and most vulnerable members, deploring the inequalities that he observed throughout his life. Over twenty-five years after the publication of *The New Property*, Reich asserted passionately:

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[141] *Id.* at 777.

[142] In 1996, Reich summarized the thesis of *The New Property* this way:

> As a result of reform efforts, "increased constitutional powers were assumed by the government in return for societal responsibility to the individuals who gave up their economic independence in recognition of the greater efficiency of large organizations." *The New Property* argued that, if the new social contract was to be respected, welfare state protections and benefits for the middle class and the poor must be treated as entitlements—a substitute for old forms of property.

Reich, *The New Economic Order, supra* note 132, at 817.

[143] Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process* (hereinafter, *An Ecological View*), 56 BROOK. L. REV. 731 (1990).

[144] Charles A. Reich, *The Liberty Impact of the New Property* (hereinafter, *The Liberty Impact*), 31 WM. & MARY L. REV. at 295 (1990).

[145] Reich, *The New Economic Order*, *supra* note 132, at 817.

[146] *See supra* notes.

> It is one thing to accept inequality as part of our system, where some enjoy luxury while other lives are comparatively spartan. But what we see today is not the kind of inequality that provides incentive to healthy ambition; it is misery that fills the rest of us with fear and horror. This is too great a punishment for fecklessness or failure; it falls below the line of what any society can morally tolerate.[147]

A persistent critic of the concentration of wealth in the hands of a few,[148] Reich claimed, "*ownership* has allowed corporations to become empires, sometimes under the control of a single individual." Far from favoring the autonomous rights advanced by Epstein, Reich concluded that as a result of economic disparity, property law "has been turned upside down." [149]

As a second line of departure from modern property rights advocates, Reich's writings are communitarian rather than individualistic in tone, emphasizing responsibility as well as rights. He identified as fundamental the question of "how much responsibility . . . the community [should] take for the protection of the individual."[150] In arguing for a broad duty, Reich exclaimed, "there is something grotesquely wrong with a society that denies individual life support while spending billions of dollars of public money on anything else. That even one person should be without shelter while the community's wealth is spent elsewhere is an abomination."[151] In emphasizing responsibility as well as right, he

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[147] Reich, *An Ecological View, supra* note 143, at 743.

[148] Reich, *The New Economic Order*, *supra* note 132, at 823 (observing, "[a]s a result of the denial of true ownership to individuals, corporations, along with a small group of very rich individuals, have become the principal owners of the nation's wealth").

[149] *Id.* at 819. In *The New Property,* Reich observed that previous reforms,

> took away some of the power of the corporations and transferred it to government. In this transfer there was much good, for power was made responsive to the majority rather than to the arbitrary and selfish few. But the reform did not restore the individual to his domain. What the corporation had taken from him, the reform simply handed on to government. . . . Today it is the combined power of government and the corporations that presses against the individual.

Reich, *The New Property, supra* note 132, at 773. Reich was quick to add that his view was not intended as "anti-institutional," but was simply a call to recognize that "the organizational revolution of the present time has its costs in individual liberty and security that now demand protection." Reich, *The Liberty Impact, supra* note 144, at 304.

[150] Reich, *An Ecological View, supra* note 143, at 731, 733 (suggesting the community should make individual security an absolute, constitutional right "which must be honored ahead of the other goals of society").

[151] *Id.* at 739.

reasoned that society tolerates continued suffering in its midst because "we do not feel responsible ourselves, and we do not feel that society is responsible. . . . It is the premise of non-responsibility that allows us to look the other way."[152]

Finally, in sharp relief from the distaste for environmental regulation expressed by Epstein and his followers, Reich found a critical relationship between environmental and social wellbeing, believing that "the idea of the individual's property is ecological. . . . Human life developed in organic communities . . . [in which] the individual is not threatened by starvation or lack of shelter unless the entire community is similarly threatened. . . ." [153] Reich explained, "The crisis of the natural environment and the crisis of the unprotected individual are similar. . . . The lakes, trees, and wildlife dying from acid rain and the human beings dying on our city streets are alike in that they are victims of an economic system out of control in that it denies and displaces its costs.[154]

The impact of *The New Property* has been profound, although Reich himself was pessimistic that his larger message had been received. Writing thirty years after publication of *The New Property,* Reich worried, "[t]he concept of *new property* for the great mass of working Americans has been rejected, and with it the promise of secure economic citizenship."[155] In contrast to Reich's pessimism, supporters and critics alike have cited to Reich's work thousands of times, bearing testimony to the enduring legacy of his work, and to its influence upon the way scholars and jurists think about property.[156]

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[152] *Id.* at 744 (suggesting that corrective action, and not blame, is necessary when unacceptable conditions "were created by many different public and private bodies, if not by all of us").

[153] *Id.* at 737.

[154] *Id.* at 734.

[155] Reich, *The New Economic Order, supra* note 132, at 819 (bemoaning, "[t]hirty years later, it is clear that the law has failed to protect the economic citizenship of individuals. After a few important but tentative steps, including *Goldberg v. Kelly,* the law has turned against the whole concept of individual economic rights"). *Id.*, citing to Goldberg v. Kelly, 397 U.S. 254, 263 n.8 (1970) (requiring pretermination evidentiary hearing prior to the discontinuance of public assistance payments to welfare recipients, and citing with approval to the writings of Reich).

[156] *See, e.g.,* HOWARD, *supra* note 15, at 124-25 (asserting that rights "became a fad," critically noting that "Reich got his wish" as expressed in *The New Property*).

2. *The New Nuisance*

> [G]reed, for lack of a better word, is good. Greed is right, greed works. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit. Greed, in all of its forms: greed for life, for money, for love, knowledge has marked the upward surge of mankind. . . .
>
> *Wall Street* (1987)[157]

By the 1980s, society had cast off the previous generation's worrisome idealism, replacing it with the pragmatic pursuit of wealth and security. Like the powerful industrialists a century earlier, corporate executives of the period were tempted by opportunities to promote their individual wellbeing at the expense of the community welfare, a temptation that the popular culture satirized in films such as *Wall Street.*[158] During this era, Ronald Reagan served as president[159] and Richard Epstein advanced his property rights philosophy.[160] Against this historical backdrop, the Supreme Court issued its 1992 opinion, Lucas v. S. Carolina Coastal Council.[161] In contrast to Reich's concern for the rights of society's weakest members, the property reforms championed by Reich (and echoed in *Lucas*) would cast a wider net, strengthening the rights of rich and poor alike.[162]

D. From Lucas to Lingle: The Return of Community Safeguards?

After *Lucas,* the Supreme Court decided six additional regulatory takings cases[163] before the era of the Rehnquist Court came to a close in 2005.[164]

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[157] In the film *Wall Street,* Gordon Gekko, a ruthless corporate raider played by Michael Douglas, advised a young Wall Street stockbroker how to achieve success in the corporate world of the 1980s. *See* http://www.imdb.com/title/tt0094291/quotes (visited July 30, 2006).

[158] *See supra* note 157 (presenting a parody of the worst excesses committed in the 1980s spirit of aggressive individualism).

[159] *See supra* note.

[160] *See supra* notes.

[161] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[162] *See, e.g., infra* notes 82-85 (discussing application of Epsteinian philosophy to wealthy land developer).

[163] *See* San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005); Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005); Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Authority ("TRPA"), 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997); and Dolan v. City of Tigard, 512 U.S. 374 (1994).

[164] Following the death of Chief Justice William H. Rehnquist, John G. Roberts, Jr. was appointed the 17th Chief Justice of the Supreme Court on September 29, 2005. *See Members of the Supreme*

Arguably, the cases indicate a renewed concern for the public interest served by land use and other environmental regulations, thereby restoring balance between individual rights and community welfare.[165]

Two of the six post-*Lucas* cases are particularly instructive. In Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency ("TRPA"),[166] six members of the Court refused to hold that a total ban on development for thirty-two months—during which the community finalized its comprehensive land use plan—required compensation as a "total taking" under *Lucas.*[167] Instead, the Court insisted that the delay suffered by the landowners was but one factor to be measured against the competing public interest:

> Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries" . . . designed to allow "careful examination and weighing of all the relevant circumstances."[168]

This renewed focus upon the public interest was reinforced just three years later, in Lingle v. Chevron U.S.A., Incorporated.[169] In that case, a unanimous Supreme Court reversed course, rejecting its prior statement that government regulators bear the burden of demonstrating that certain land use regulations "substantially advance legitimate state interests."[170] In explicitly uncoupling the analytical framework of regulatory takings from that of substantive due process,[171] the Court relieved the government of a heightened burden of proof, and once again restored

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Court of the United States. On January 31, 2006, Samuel A. Alito, Jr. assumed the associate justice position vacated by the retiring Justice Sandra Day O'Connor. *Id.*

[165] *See generally,* Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court,* 57 HASTINGS L.J. 759 (2006).

[166] 535 U.S. 302 (2002).

[167] *Id.* (Stevens, J., joined by O'Connor, Kennedy, Souter, Ginsburg, and Breyer, J.J.)

[168] *Id.* at 1478. *See also* Lazarus*, supra* note, at 819 (concluding that after *TRPA*, *Lucas's* "precedential reach became almost a nullity").

[169] 544 U.S. 528 (2005).

[170] *See* Agins v. City of Tiburon, 447 U.S.255 (1980) (imposing requirement in context of development exaction), *abrogated by* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

[171] *Lingle,* 544 U.S. at 540 (explaining that the "'substantially advances' [test] . . . prescribes an inquiry in the nature of a due process, not a takings test, and . . . it has no proper place in our takings jurisprudence").

balance to the *Penn Central* analysis. The Court acknowledged that its "substantially advance" detour had been an analytical mistake, and conceded that it must "eat crow" to correct its error.[172]

After an initial period of flux, a similar pattern of regulatory tolerance emerged from the post-*Lucas* decisions of the Federal Circuit.[173] In the immediate aftermath of *Lucas,* the Federal Circuit interpreted *Lucas* as signaling a "sea change" favorable to the property rights of landowners. Under this view, the government's defense in *all* regulatory takings cases—spilling beyond the narrow universe of *Lucas* total-takings cases—was restricted to background principles of nuisance and property law. As a result, *Penn Central's* wide-ranging balancing of regulatory benefits and burdens was replaced with a cramped sphere of acceptable government action. For example, in Loveladies Harbor, Inc. v. United States, the Federal Circuit affirmed the lower court's finding that the prohibition of construction in a wetland constituted a regulatory taking.[174] The court explained,

> The effect, then, of *Lucas* was to dramatically change the third criterion [of the *Penn Central* analysis], from one in which courts . . . were called upon to . . . balanc[e] private property rights against state regulatory policy, to one in which state property law, incorporating common law nuisance doctrine, controls. This sea change removed from regulatory takings the vagaries of the balancing process. . . . It substituted instead a referent familiar to property lawyers everywhere. . . .[175]

The Federal Circuit's aggressive interpretation of property rights under *Lucas* endured for a decade. In 2004, however, the Circuit announced its "return to the pre-*Lucas* evaluation of the 'character of the Government actions' factor [of *Penn Central*]."[176] Thereafter, the court noted, it would adopt a "gestalt approach," evaluating both the purpose and desired effect of governmental regulation.[177] As a

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[172] Official Oral Argument Transcript, at 21, *Lingle,* 544 U.S. 528, No. 04-163 (Feb. 22, 2005) (remarks of Justice Scalia).

[173] *See* 28 U.S.C. §§ 1346, 1491 (providing United States Court of Federal Claims exclusive jurisdiction in cases involving over $10,000, and sharing concurrent jurisdiction with the federal district course for regulatory takings claims not exceeding $10,000).

[174] Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), *abrogation recognized by* Bass Enterprises Production Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004).

[175] *Id.* at 1179. *See also* Palm Beach Isles Assocs., 231 F.3d 1354, 1358 (Fed. Cir. 2000) (characterizing the *Loveladies Harbor* analysis as a "*Penn Central* test with a *Lucas* gloss").

[176] Bass Enterprises Production Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004).

[177] *Id.* at 1370. *See also* Maritrans Inc. v. United States, 342 F.3d 1344, 1356 (Fed. Cir. 2003) (noting that courts should "consider the purpose and importance of the public interest underlying a regulatory imposition").

result, the Federal Circuit removed its judicial thumb from the "individual rights" side of the individual-community balancing scale.

IV. WHAT'S NEW ABOUT NUISANCE? THE AFTERMATH OF *LUCAS*

> The *Lucas* legacy represents one of the starkest recent examples of the law of unintended consequences."
>
> Michael C. Blumm (2005)[178]

> To the extent . . . that takings law has perceptibly shifted since the Court's 1978 *Penn Central* ruling, it has arguably become more and not less difficult for regulatory takings plaintiffs to prevail. . . . What Scalia [through *Lucas*] hoped to serve as a *per se* takings rule proves, in its practical operation, to work more often as a *per se* no takings rule.
>
> Richard J. Lazarus (2006)[179]

This section will trace the post-*Lucas* development of the law of *new nuisance*. In broad strokes, the discussion will consider the evolution of the "antecedent inquiry" contemplated by the *Lucas* majority,[180] as well as the "changed circumstances or new knowledge" referenced by Justice Kennedy's concurrence.[181] This analysis will set the stage for Part V's application of new nuisance doctrine to three specific environmental problems: wetland development, sprawling land use patterns, and global warming.

The first draft of this section produced a workmanlike, methodical cataloguing of the extent to which new scientific learning has been incorporated into the *Lucas* defense. As reported by Professors Blumm and Lazarus, *Lucas* left a legacy surprisingly favorable to governmental defendants in the form of a new defense that proved to be *categorical* in nature.[182] Beyond confirming that discovery, my subsequent work on the manuscript uncovered a second unexpected development—*Lucas* may have contributed to a spillover effect, reinvigorating the use of nuisance in its traditional *offensive* tort posture, outside the context of a *defense* to regulatory takings claims.[183] That is, as new ecological

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[178] Michael C. Blumm, Lucas's *Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defense,* 29 HARV. ENVTL. L. REV. 321, 322 (2005).

[179] Lazarus, *supra* note 165, at 823-24.

[180] *See supra* note and accompanying text.

[181] *See supra* note and accompanying text.

[182] *See infra* note and accompanying text.

[183] *See infra* Part IV.A.2.

and other learning began to connect the dots between cause and effect, more aggressive nuisance claims became viable.[184]

Third, yet another analytical surprise took shape, this time in the factual context of climate change. As California initiated global warming legislation, property rights advocates were largely silent. The regulatory takings challenges that I had anticipated did not materialize.[185] Instead, many in the regulated community acquiesced, with some even calling for broad *federal* regulation. Can this reaction be attributed, at least in part, to *Lucas?* The next section considers this possibility. In addition, it describes in more detail the progression of new nuisance law from *Lucas* defense, to common law offense, and beyond to catalyst for legislative action.

A. The New Posture: From Defense, to Offense, to Legislative Catalyst

1. New Nuisance as Defense

Lucas made clear that the new nuisance rule functions as an affirmative defense to governmental liability in cases where regulation deprives property of all economically beneficial use. Procedurally, the Court explained, the defense should be considered as part of an "*antecedent inquiry* into the nature of the owner's estate," during which the government bears the burden of "show[ing] that the proscribed use interests were not part of [the landowner's] title to begin with."[186] In bearing its burden, the government may go beyond traditional public and private nuisance, relying also upon "background principles of the State's law of property."[187] Concurring Justice Kennedy emphasized that in his view the defense should be construed broadly, arguing that "the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society."[188] Following this view, lower courts have applied a wide

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[184] *See infra* Part IV.B.

[185] The reaction, of course, was not uniform. For a nuanced discussion, *see* infra Part IV.A.3.

[186] *Lucas,* 505 U.S. at 1027 (emphasis added).

[187] *Id.* at 1029.

[188] *Lucas,* 505 U.S. at 1035 (Kennedy, J., concurring).

variety of takings defenses embedded in state nuisance and property law,[189] both common law and statutory.[190]

As the lower courts have worked through the ramifications of the *Lucas* defense, at least two important developments have followed. First, as Professor Blumm has noted, in some cases *Lucas's* landowner-friendly *categorical rule* has given way to a regulator-friendly *categorical defense*:

> [R]ather than heralding in a new era of landowner compensation or government deregulation, *Lucas* instead spawned a surprising rise of categorical defenses to takings claims in which governments can defeat compensation suits without case-specific inquiries into the economic effects and public purposes of regulations. *Lucas* accomplished this by establishing the prerequisite that a claimant must first demonstrate that its property interest was unrestrained by prior restrictions.[191]

The government's defense becomes categorical primarily in cases where it rests upon background principles of property (such as the public trust doctrine, the natural use doctrine, the navigational servitude, customary rights, water law principles, the wildlife trust, and Indian treaty rights), rather than upon principles of nuisance.[192]

Second, although *Lucas* contemplates an antecedent inquiry into the landowner's property interest only in the case of *total takings,*[193] lower courts

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[189] *See Blumm, supra* note 178, at 367 (concluding that "over the past twelve years, nearly a dozen distinct categories of *Lucas*-inspired threshold defenses have been proposed to and subsequently employed by lower courts to reject takings claims"). Blumm believes this regulation-friendly trend is likely to continue. *Id.* at 364-65 ("Because many [*Lucas* defenses are a product of state law, it does not seem likely that the Supreme Court . . . could arrest this proliferation, even if it wanted to do so.").

[190] *Id.* at 354-59 (observing that "[a]lthough Justice Scalia's *Lucas* majority opinion cautioned against employing legislatively decreed background principles, many post-Lucas courts have sided with Justice Kennedy's *Lucas* concurrence to hold that state and federal statutes may function as a threshold bar to takings challenges").

[191] *Id.* at 322.

[192] *Id.* at 334 n. 75 and 341-54 (noting that nuisance remains inherently a balancing test).

[193] As *Lucas* explained:

> The "total taking" inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . , the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided

have begun to put landowner property interests under the microscope in *all* takings cases.[194] As a result, the principle question in a traditional takings analysis—*did the government go too far?*[195]—has been postponed until after consideration of the antecedent question, *did the landowner go too far?*[196] In practical terms, this has leveled the playing field between public and private interests. It might also defuse the modern one-sided rhetoric of rights that portrays landowners as the victims of governmental regulators, without regard for important community values that government regulations may protect.[197] As a result of this preliminary opportunity to state their case, regulators can now defeat takings liability during the early stages of litigation by demonstrating that the landowner never had the unfettered right to engage in the regulated activity. In such cases, courts need not address the additional *Penn Central* factors that may favor landowners, including the degree of interference with reasonable, investment-backed expectations, and the economic impact of the challenged regulation.[198]

2. New Nuisance as Offense

By focusing attention upon the traditional doctrine of nuisance, *Lucas* breathed new life into an old body of law, turning it into an important governmental defense. Moreover, this attention to defensive nuisance may have triggered a renewed appreciation of the doctrine's usefulness in its more common offensive posture.[199] It is impossible to demonstrate a precise cause-and-effect relationship between *Lucas* and subsequent affirmative nuisance actions. Nevertheless, it is noteworthy that a number of novel nuisance lawsuits were filed in the fifteen years following *Lucas.* Among these are public nuisance claims filed against nontraditional defendants—the manufacturers of products such as guns,

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> through measures taken by the claimant and the government (or adjacent private landowners) alike. . . .

Lucas, 505 U.S. at 1031-32

[194] *See* Blumm, *supra* note 178, at 322, 326 (asserting that "[i]n effect, the *Lucas* decision fundamentally revised all takings analysis by making the nature of the landowner's property rights a threshold issue in every takings case").

[195] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[196] *See supra* note.

[197] *See supra* Part I.

[198] *See supra* note and accompanying text.

[199] *See, e.g.,* Louise A. Halper, *Untangling the Nuisance Knot,* 26 B.C. ENVTL. AFF. L. REV. 89, 91 (1998) (asserting that the law of regulatory takings has "restored" the law of nuisance "to the agenda of regulators, legislators, and planners"). *But see* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOL. L.Q. 755 (2001).

lead paint, tobacco,[200] and automobiles.[201] Post-*Lucas* lawsuits have also alleged nontraditional harms, such as the loss of a subsistence fishing lifestyle caused by an Alaskan oil spill,[202] or warming of the global climate caused by the emission of carbon dioxide by electrical utilities and automobiles.[203]

3. New Nuisance as Legislative Catalyst

The new interest in both defensive and offensive nuisance—as triggered by Lucas—may serve to clarify the relationship between developmental activities and negative environmental consequences. As courts connect the dots between cause and effect, actors may become more cognizant of their potential liability for actions that harm wetlands, disrupt natural lands, and release greenhouse gases into the atmosphere. As legal precedent and new learning evolve—and as liability becomes more likely—the industry decision making process will undoubtedly respond.

At some undefined tipping point, it may become more cost effective for the regulated community to shape, rather than resist, legislation.[204] As a result, industry may find it more favorable to engage in the development of comprehensive, federal legislation than to initiate numerous, individual takings lawsuits. Moreover, some entrepreneurial actors may come to embrace federal legislation as a consistent baseline that creates a potentially profitable market for technological innovation. Those who adapt first may find lucrative opportunities to develop compliance tools that others may adopt.

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[200] *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort,* 45 WASHBURN L.J. 541 (2006).

[201] *See infra* Part V.C.

[202] *See* Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997) (rejecting plaintiffs' claim for failure to demonstrate that they suffered a special injury different in kind, rather than degree, from all citizens of Alaska).

[203] *See infra* Part V.C.

[204] Dean Scott, *Boucher Tells Coal Industry Bill is Coming; Pelosi, Dingell End Dispute Over Select Panel,* 38 Env't Reporter 302, Feb. 9, 2007 (describing warning by head of House of Representatives energy subcommittee to coal industry "that federal legislation limiting greenhouse gas emissions is inevitable and that it would be better off working with Congress on a proposal than risk facing a more stringent bill from the next administration").

B. The New Learning: Environmental Connectivity

> [C]hanged circumstances or new knowledge may make what was previously permissible no longer so.
>
> Justice Kennedy[205]

> New appreciation of the significance of endangered species; the importance of wetlands; and the vulnerability of coastal lands shapes our evolving understandings of property rights.
>
> Justice Stevens[206]

The contemporary emphasis on rights rather than responsibility has skewed the current perception of the natural world. In particular, community efforts to protect the environment have been construed as "taking" something away from regulated actors, but there has been little serious consideration of whether individual development activities may also "take" something away from the community. As science learns more about the ecological consequences of human development activity, it becomes apparent that just as public interest regulation may adversely impact certain developers, so also may those developers have adverse impacts upon their neighbors. The doctrine of regulatory takings has been slow to recognize this two-way relationship. In theory, traditional takings law has long recognized a nuisance exception under which landowners are not entitled to compensation when they are precluded from using their land to create a nuisance.[207] In actual practice, however, some modern courts have been reluctant to recognize that common development activities may actually harm the community in a nuisance-like fashion.[208]

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[205] *Lucas,* 505 U.S. (Kennedy, J., concurring). *See also* Reich, *An Ecological View, supra* note 143, at 744 (concluding that "[t]he environmental principle should warn us that, because all life is interconnected, none of us can escape the consequences of suffering in our midst").

[206] *Lucas,* 505 U.S. at 1069-70 (Stevens, J., dissenting).

[207] *See, e.g.,* Mugler v. Kansas, 123 U.S. 623 (1887) (requiring no compensation where law prohibited manufacture of alcoholic beverages); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (requiring no compensation where ordinance prohibited operation of a brick yard within city limits); Miller v. Schoene, 276 U.S. 272 (1928) (requiring no compensation where government ordered destruction of diseased cedar trees to protect neighboring orchards); Goldblatt v. Hempstead, 369 U.S. 590 (1962) (requiring no compensation where law impeded quarry operation in residential area).

[208] *See Lucas,* 505 U.S. at 1024 (reasoning that "the distinction between 'harm-preventing' [without compensation] and 'benefit-conferring' [requiring compensation] regulation is often in the eye of the beholder" and concluding that it is quite possible "to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case").

Modern scholarship has begun to identify the correlation between action and consequence. In particular, some scholars have begun to recognize what this article calls *environmental connectivity,* the relationship between the development of land (and the use of other natural resources) and community welfare. This body of work moves beyond the traditional narrative under which the government "takes" and the land developer "gives" (jobs and other benefits), recognizing instead a bilateral relationship. At least three broad theoretical aspects of this literature are particularly relevant to the issue of regulatory takings.

First, the field of law and economics has developed the concept of "externalities," the recognition that actions often have spillover effects not fully borne by the actors.[209] As long as these externalities remain unidentified, actors are able to escape responsibility for the full consequences of their negative externalities, and fail to receive recognition for the full scope of their positive externalities. Government, therefore, must carefully identify the complete range of externalities flowing from a particular action before it can fashion any effective system of regulations, incentives, or rewards. In other words, it is a proper role of government to "internalize" externalities,[210] thereby requiring actors to absorb the negative impacts of their actions, rather than to foist them onto the community.

A second aspect of the new learning specifically applies the economic theory of externalities to the law of regulatory takings. Contrary to the conventional wisdom—which begins with a concern for fairness to landowners—some modern scholars have emphasized fairness to communities. For example, an article in the Yale Law Journal entitled *Givings*[211] examines the positive externalities of numerous government programs, ranging from zoning changes beneficial to certain property owners, to relaxation of environmental regulations, to the granting of licenses.[212] Restating traditional *takings* doctrine from the perspective of the community, the authors argue,

> [I]t is inequitable to bestow a benefit upon some people that, in all fairness and justice, should be given to the public as a whole. In a giving, a small group is able to force the public as a whole to subsidize the group's preferential treatment. For example, when the state permits logging companies to chop down trees in national

[209] *See, e.g.,* R.H. Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960).

[210] *See, e.g.,* Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation,* 91 CORNELL L.R. 653, 655 (2006).

[211] Abraham Bell and Gideon Parchomovsky, *Givings,* 111 YALE L.J. 547 (2001).

[212] *Id.* at 549.

> forests for lumber, it is forcing the public as a whole to surrender natural resources for the private profit of the logging companies.[213]

Asserting that "takings and givings are so inextricably related that one cannot have a coherent takings jurisprudence without an attendant giving jurisprudence,"[214] the authors construct an elaborate model for identifying, assessing, and collecting fair charges for givings.[215] As an alternative method to promote an evenhanded application of the takings doctrine, some scholars use the language of "rights," recognizing the rights of communities (as *receptors*), as well as the rights of property owners (as *generators*). In the context of pollution, these scholars argue that the law should focus upon the property rights of "receptors" of pollutants, rather than the "generators" of pollution.[216] They conclude that the present system "effectively subsidize[s] polluters by permitting then to deposit waste into public and private property and to use the population as test subjects while unconstitutionally taking their property rights."[217]

A third strand of modern learning studies and quantifies the numerous benefits produced by a healthy ecosystem. Stanford conservation biologist Gretchen Daily and others conducted pioneering research in "ecosystem services,"[218] observing that "environments of interacting plants, animals, and microbes . . . can be seen as capital assets, supplying human beings with a stream of services that sustain and enhance our lives."[219] Their work seeks to "measure, capture, and protect the newly discovered values before they are lost.[220]

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[213] *Id.* at 554. *Compare* Armstrong v. United States, 364 U.S. 40, 49 (1960) (explaining that the takings clause prevents the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

[214] Bell & Parchomovsky, *supra* at 552.

[215] *Id.* at 604-09.

[216] Robert H. Cutting and Lawrence B. Cahoon, *Thinking Outside the Box: Property Rights as a Key to Environmental Protection,* 22 PACE ENVTL. L. REV. 55 (2005).

[217] *Id. See also* Joseph L. Sax, *Essay: Why America Has a Property Rights Movement,* 2005 U. ILL. L. REV. 513 (2005); Joseph L. Sax, *Understanding Transfers: Community Rights and the Privatization of Water,* 1 WEST-N.W. J. ENVT'L L. & POL'Y 13 (1994).

[218] *See* NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS (Gretchen C. Daily ed., 1997); GRETCHEN C. DAILY & KATHERINE ELLISON, THE NEW ECONOMY OF NATURE: THE QUEST TO MAKE CONSERVATION PROFITABLE (2002). *See also* Salzman et al., *Protecting Ecosystem Services: Science, Economics, and Law*, 20 STAN. ENVTL. L.J. 309 (2001); Robert L. Fischman, *The EPA's NEPA Duties and Ecosystem Services,* 20 STAN. ENVTL. L.J. 497 (2001); J.B. Ruhl & R. Juge Gregg, *Integrating Ecosystem Services into Environmental Law: A Case Study of Wetlands Mitigation Banking,* 20 STAN. ENVTL. L.J. 365 (2001).

[219] DAILY & ELLISON, *supra,* at 5.

[220] *Id.* at 5.

Ecosystem services can provide a broad range of benefits to society, often quite unexpected. For example, the 2005 book *Last Child in the Woods: Saving Our Children From Nature-Deficit Disorder* argues that the modern alienation from nature—termed "nature deficit disorder"—damages children, and that exposure to nature could provide a therapy for depression, obesity, and attention-deficit disorder.[221] A related body of work studies "natural capital," defined as "the stock that yields the flow of natural resources—the population of fish in the ocean that regenerates the flow of caught fish that go to market; the standing forest that regenerates the flow of cut timber. . . ."[222] Natural capital yields both natural resources and natural services.[223] Like traditional forms of capital, these scholars argue, natural capital should be maintained intact.[224] Still other scholars focus on reform of cost-benefit analysis. They argue that ecosystem services and natural capital are consistently undervalued in cost-benefit analyses because such assets are external to traditional economic markets.[225] Overall, the literature on externalities, givings, ecosystem services, and related disciplines provides fertile support for the modern evolution of nuisance doctrine, as stimulated by *Lucas*.

V. THE NEW NUISANCE APPLIED: CONNECTING THE DOTS

This section applies the new nuisance doctrine to three difficult environmental problems—wetland development, sprawling land use patterns, and global warming. Each problem is exacerbated, in part, when landowners, developers, and ordinary citizens are allowed to harm environmental resources without bearing (or perhaps even knowing) the full economic, environmental, and social costs of their actions. As considered below, new nuisance law may be an appropriate vehicle to allocate these environmental costs, shifting responsibility back to the actors whose enterprises inflict nuisance-like harms upon society.

The discussion begins with a survey of the evolving new knowledge of the relationship between environmental destruction and public harm. It then traces three aspects of the post-*Lucas* evolution of the law: 1) the extent to which communities have successfully asserted the *Lucas* affirmative defense to avoid

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[221] RICHARD LOUV, LAST CHILD IN THE WOODS: SAVING OUR CHILDREN FROM NATURE –DEFICIT DISORDER (2005). *See also* David A. Dana, *Existence Value and Federal Preservation Regulation,* 28 HARV. ENVTL. L. REV. 343 (2004); JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED (2005).

[222] HERMAN E. DALY, BEYOND GROWTH , at 80 (1996).

[223] *Id.*

[224] *Id.* at 76.

[225] *See* LISA HEINZERLING & FRANK ACKERMAN, PRICING THE PRICELESS: COST-BENEFIT ANALYSIS OF ENVIRONMENTAL PROTECTION (Georgetown Environmental Law & Policy Institute, 2002).

takings liability for wetland, land use, and global warming regulation; 2) the extent to which offensive public nuisance lawsuits have succeeded when alleging environmental harms; and 3) the extent to which the new learning has induced the regulated community to accept responsibility for its actions, paving the way for the passage of new environmental legislation likely to escape facial challenge under the regulatory takings doctrine.

A. Wetland Destruction as New Nuisance

1. The New Learning on Wetlands

> Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.
>
> Just v. Marinette County (1972)[226]

Modern studies have revealed that wetlands perform a vast range of ecosystem services for the community. The Environmental Protection Agency has identified at least five such functions;[227] and studies have begun to quantify the economic value of the services performed.[228] First, wetlands improve water quality by processing, decomposing, and trapping inorganic nutrients, organic wastes, and suspended solids that would otherwise pollute surface waters.[229] Site-specific studies have valued this service in excess of one million dollars for individual communities.[230] Second, wetlands provide protection against floods,

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[226] 201 N.W. 2d 761, 768 (Wis. 1972).

[227] *See United States Env'tl Protection Agency, Functions and Values of Wetlands* (hereinafter, EPA, *Functions and Values*) (EPA 843-F-01-002c, September 2001), *available at* http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf (visited July 18, 2006).

[228] *See, e.g.,* Edward B. Berbier et al., *Economic Valuation of Wetlands: A Guide for Policy Makers and Planners* (Ramsar Convention Bureau 1997), *available at* www.ramsar.org/lib (visited July 18, 2006)); North Carolina State University, Water Quality Group, *Wetland Functions and Values, available at* http://h2osparc.wq.ncsu.edu/info/wetlands/funval.html (visited July 18, 2006); R.P. Novitzki et al., *Restoration, Creation, and Recovery of Wetlands: Wetland Functions, Values, and Assessment,* United States Geological Survey Water Supply Paper 2425, *available at* http://water.usgs.gov/nwsum/WSP2425/functions.html (visited July 18, 2006).

[229] *See* William S. Sipple, United States EPA Office of Water, *Wetland Functions and Values*, *available at* http://www.epa.gov/watertrain/wetlands/index.htm (visited July 18, 2006).

[230] Two examples utilized by the EPA include the Congaree Bottomland Hardwood Swamp of South Carolina ("removing a quantity of pollutants that would be equivalent to that removed annually by a $5 million waste water treatment plant" according to a 1990 study) and a 2500 acre wetland in Georgia (saving one million dollars annually in pollution abatement costs). *Id.* at Section 5. Wetlands improve the flow (or hydrology) of water, as well as its quality. For example,

hurricanes, and shoreline erosion by storing excess waters and releasing them slowly.[231] A Minnesota study found that the draining of five thousand wetland acres destroyed natural flood control valued at $1.5 million annually.[232] Even more striking, a Mississippi River basin study found that wetland destruction and levee construction had reduced the basin's natural storage capacity from sixty days of floodwater to twelve days of floodwater.[233] Third, wetlands provide habitat for fish, wildlife, and plants, making them "some of the most biologically productive natural ecosystems in the world, comparable to tropical rain forests and coral reefs . . . ."[234] This habitat supports a commercial and recreational fishing industry valued at approximately seventy-nine billion dollars annually.[235] Fourth, wetlands help to maintain favorable atmospheric conditions by storing carbon in peat, thus helping to control global warming. When drained or filled, wetlands release the carbon as carbon dioxide, a greenhouse gas that affects the earth's climate.[236] Finally, wetlands provide aesthetic, recreational, and educational opportunities. Studies estimate that Americans spend more than fifty-nine billion dollars annually in connection with wetland hunting, fishing, birdwatching, and wildlife photography.[237]

"[o]ne calculation for a 5-acre Florida cypress swamp recharging groundwater was that, if 80 percent of swamp was drained, available ground water would be reduced by an estimated 45 percent." *Id.*

[231] *Id.* at Section 6.

[232] *Id.* The EPA estimates that a single wetland acre can store up to 1.5 million gallons of floodwater. EPA, *Functions and Values, supra* note. Citing to the 38 deaths and billions of dollars of damage caused by the 1993 upper Mississippi River Basin flood, the EPA commented, "Historically, 20 million acres of wetlands in this area had been drained or filled, mostly for agricultural purposes. If the wetlands had been preserved rather than drained, much property damage and crop loss could have been avoided." *Id.*

[233] *Id.* (concluding that "in addition to their fish and wildlife values, wetlands reduce the likelihood of flood damage to homes, businesses, and crops in agricultural areas" and results in "less monetary flood damage (and related insurance costs), as well as protection of human health, safety, and welfare"). As a related function, wetlands adjacent to open water provide erosion protection and "buffer the storm surges from hurricanes and tropical storms by dissipating wave energy before it impacts roads, houses, and other man-made structures." *Id.*

[234] EPA, *Functions and Values, supra* note 229.

[235] *Id*. (citing to 1997 data from the Pacific Coast Federation of Fishermen's Associations).

[236] Sipple, *supra* note 229, at Section 2.

[237] *Id.*

2. Defending Wetland Regulations

> Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.
>
> Justice Kennedy (1992)[238]

a. Wetland destruction as categorical defense: In the post-*Lucas* era, a number of state and federal courts have held that governmental efforts to protect wetlands do not constitute regulatory takings because wetland destruction constitutes a nuisance. Often, these courts apply the new nuisance defense of *Lucas,* in the context of a *Penn Central* balancing analysis.[239] The state courts of Massachusetts,[240] Pennsylvania[241] and Rhode Island[242] have based their holdings

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[238] Lucas v. South Carolina Coastal Council*,* 505 U.S. at 1035 (Kennedy, J., concurring).

[239] *See* Blumm, *supra* note 178, at 327 (discussing background principles as categorical takings defense) and 336 (arguing that a "nuisance defense is particularly appropriate in the case of wetlands protection").

[240] *See* Commonwealth of Massachusetts v. Blair, 2000 WL 875903 (Mass. Super. 2000) (unreported decision) (rejecting takings challenge to state statute prohibiting the alteration of land within 200 feet of surface waters within protected watersheds supplying public drinking water), *affirmed as modified,* Commonwealth v. Blair, 805 N.E.2d 1011 (Mass. App. 2004). The trial court held:

> The rights of a property owner to utilize lakefront property comes with significant limitations when the regulatory concern is for the health and welfare of society. Conduct affecting a public resource, such as public water supplies, that could be actionable at common law . . . under a public nuisance theory, may be aptly regulated, or at minimum, be regulated with a decreased risk of having the regulation adjudicated an unconstitutional taking. . . . The character of the government action here, therefore, is much akin to prohibiting acts which may have been prohibited, at least in part, at common law prior to the enactment of the [challenged statute] in 1992.

Id. at *7. The appellate court did not disturb this holding in its modified affirmance. *See also* Gove v. Zoning Board of Appeals of Chatham, 831 N.E.2d 865 (Mass. 2005) (rejecting takings challenge to denial of permit to build single-family house on undeveloped land within coastal conservancy district). The trial court had found that the subject property was located within a flood plain, and that construction of the proposed house would pose a danger to neighboring landowners. *Gove,* 831 N.E. 2d at 875. Accordingly, the Supreme Court concluded, "[r]easonable government action mitigating such harm, at the very least when it does not involve a 'total' regulatory taking or a physical invasion, typically does not require compensation." *Id.*

[241] *See* Machipongo Land and Coal Co., Inc. v. Commonwealth of Pennsylvania, 799 A.2d 751 (Pa. 2002) (rejecting takings challenge to state regulation designating particular watershed as unsuitable for mining). Independent of evidence that the proposed mining operation would destroy a trout population and adversely impact water supply, the Court stated, "We have explained that "we believe that the public has a sufficient interest in clean streams alone regardless of any specific use thereof . . . [to warrant] injunctive relief." *Id.* at 774, quoting Commonwealth v. Barnes & Tucker Co., 319 A.2d, 871, 882 (Pa. 1974).

on explicit findings that the destruction of wetlands or other aquatic resources constitutes a public nuisance.

Of particular interest to government regulators is the final resolution of the decades-long *Palazzolo* litigation.[243] In 1985, a Rhode Island landowner sought permission to fill and develop approximately eighteen acres of coastal salt marsh.[244] The relevant state agency denied permission pursuant to state regulation.[245] The landowner brought an inverse condemnation action, alleging that denial of his application constituted a regulatory taking. Ultimately, the case was heard by the United States Supreme Court, which held that the claim was ripe for review, and that the landowner's acquisition of title after the effective date of the state's wetland regulation was not an automatic bar to the takings claim.[246] Finding that the challenged regulation had not deprived the petitioner of all economically beneficial use of his property, the Court remanded for a resolution of the takings claim under the *Penn Central* test.[247] In an earlier phase of the litigation, the Rhode Island trial court had found that the contemplated wetland development would constitute a public nuisance.[248] Eight years later, on remand from the United States Supreme Court, the trial court again found that the proposed wetland development would be a public nuisance.[249] The court concluded that, without more, nuisance would serve as a "preclusive defense" to the landowner's takings claims:[250]

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[242] *See infra* notes. *See also* Milardo v. Coastal Resources Management Council, 434 A.2d 266, 268-69 (R.I. 1981) (in pre-*Lucas* decision, holding that there is no property right to fill wetlands because it would impair public resources).

[243] *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (*Palazzolo I*) (finding 1986 denial of application for dredge-and-fill permit for beach facility ripe for review under *Penn Central* analysis).

[244] *See* Palazzolo v. Rhode Island, 2005 W.L. 1645974 (R.I. Super. 2005) (*Palazzolo II)* (unpublished decision) at *1. The state Coastal Resources Management Council had denied two previous permit applications submitted by Palazzolo. *Id.* at *1 n.2 and n.4.

[245] Under the Coastal Resources Management Plan of 1976, state regulations prohibited the filling of certain coastal wetlands without a special exception.

[246] *Palazzolo I,* 533 U.S. at 630, 632.

[247] *Id.*

[248] *See Palazzolo II,* 2005 WL 1645974 at *1 (discussing 1997 judgment of the Rhode Island Superior Court after 7-day bench trial).

[249] *See id.* at *5.

[250] *Id.* at *5.

> The State has presented evidence as to various effects that the development will have including increasing nitrogen levels in the pond, both by reason of the nitrogen produced by the attendant residential septic systems, and the reduced marsh area which actually filters and cleans runoff. This Court finds that the effects of increased nitrogen levels constitute a predictable (anticipatory) nuisance which would almost certainly result in an ecological disaster to the pond. . . . Nor is the proposed high density subdivision suitable for the salt marsh environs presented here.[251]

In so concluding, the court was impressed by the array of ecosystem services that would be curtailed by the filling of coastal marshlands.[252]

In contrast to these regulatory-friendly decisions in Massachusetts, Pennsylvania, and Rhode Island, courts in the Federal Circuit have specifically rejected the new nuisance defense of *Lucas* four times before or during 2001. These decisions have been based on the law of nuisance in the states of California,[253] Florida,[254] Delaware,[255] and New Jersey,[256] with the federal court

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[251] *Id.*

[252] *Id.*

[253] Forest Properties, Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999). In *Forest,* the Federal Circuit affirmed the trial court's finding that the proposed dredging and filling of a lake bottom to promote residential construction would not constitute a nuisance under California law. 177 F.3d at 1366. Nevertheless, the court rejected the takings challenge, finding that the landowner lacked reasonable expectations that it could develop its property as proposed. *See supra* note.

[254] *See* Florida Rock Industries, Inc. v. United States, 45 Fed. Cl. 21 (1999) (finding that denial of § 404 permit in connection with limestone mining operation constituted a regulatory taking). The court concluded,

> [P]laintiff's limestone mining operation would, like similar operations in the vicinity, result in only moderate, superficial pollution that does no harm, and would not be considered a nuisance under the relevant Florida laws. Indeed, plaintiff's operation was suitably located in the community and designed to help meet the community's need for aggregates to be used in construction.

Id. at 28-31.

[255] *See* Walcek v. United States, 49 Fed. Cl. 248 (2001). In *Walcek,* the Court of Federal Claims found, "[t]here is no significant evidence in this case that the plaintiffs' proposed use of the Property [filling and development of salt marsh] would formally constitute a nuisance under Delaware state law so that the application of the Federal wetland regulations could be viewed as enforcing a limitation already inherent in the Property." *Id.* at 270. Nevertheless, the court rejected the takings challenge, finding acceptable the character of the government action to protect wetlands.

[256] *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (holding denial of § 404 permit to constitute a regulatory taking, denying landowner of all economically beneficial use of New Jersey wetland property). The Federal Circuit agreed with the trial court's conclusion

concluding that government defendants failed to demonstrate that their challenged actions were designed to prevent common law nuisance under the relevant state's law.[257] Importantly—despite rejecting the argument under *Lucas* that wetland destruction is a nuisance under state law—two of these cases nevertheless held in favor of the governmental defendants under the broader *Penn Central* test.[258]

b. Wetland destruction as nuisance-like balancing factor: Numerous other courts have found that the fill or development of wetlands may cause community harm, and that governments may regulate to prevent such harm without providing compensation to the burdened landowner.[259] These courts stop short of describing wetland destruction as a "nuisance," but has nevertheless been willing to reject takings challenges to regulations that preclude nuisance-like activities. This group includes the Federal Circuit,[260] as well as the states of

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that the federal defendant had failed to sustain its burden of proving that wetland filling constituted a common law nuisance. *Id.* at 1183. Ironically, the Federal Circuit preceded its holding in favor of the landowner with an impassioned paragraph extolling the value of wetlands:

> There can be no doubt today that every effort must be made individually and collectively to protect our natural heritage, and to pass it to future generations unspoiled. The destruction of ancient civilizations by human misuse of the environment, such as that at Ephesus, teaches the need for public policies that work within the natural environment, rather than attempt radically to alter it.

Id. at 1175. *Loveladies* has been discredited on other grounds. *See* Bass Enterprises Production Co., 381 F.3d 1360 (Fed. Cir. 2004). *See also* Mansoldo v. New Jersey, 898 A.2d 1018, 1025 (N.J. 2006) (rejecting argument that landowner's stipulation to agency determination that proposed development in flood plain "would pose a threat to other properties during a flood" constituted a concession that intended use of property is a nuisance under *Lucas*).

[257] *But see John R, supra* note (suggesting that in absence of controlling law in the relevant state, government regulators may cite to persuasive evidence that the subject activity would constitute a nuisance in other jurisdictions).

[258] *See infra* note (applying California law) and (applying Delaware law).

[259] *See generally,* Gina Schilmoeller, *Invoking the Fifth Amendment to Preserve and Restore the Nation's Wetlands in Coastal Louisiana,* 19 TUL. ENVTL. L.J. 317 (2006); Fred P. Bosseslman, *Limitations Inherent in the Title to Wetlands at Common Law,* 15 STAN. ENVTL. L.J. 247 (1996).

[260] *See* Norman v. United States, 63 Fed. Cl. 231, 286 (2004) (rejecting takings challenge to wetland mitigation requirement imposed to Nevada property under § 404 permitting process, and approving character of government action "especially in light of the fact that the government has a legitimate public welfare obligation to preserve wetlands and that the unnecessary destruction of wetlands violates environmental laws and is contrary to public policy"); John R. Sand & Gravel Co. v. United States, 60 Fed. Cl. 230, 243 (2004) (remanding for factual development of record in takings challenge to administrative use of Michigan mining property during environmental remediation of neighboring landfill, and suggesting that the pollution of ground water may constitute a public or private nuisance); Brace v. United States, 48 Fed. Cl. 272, 278-79 (2000) (remanding for factual development of record in takings challenge to administrative order prohibiting drainage of wetlands, and approving character of the government action implementing its "legitimate public welfare obligation to preserve our nation's wetlands").

Alaska,[261] Florida,[262] Michigan,[263] New Hampshire,[264] New Jersey,[265] New York,[266] Oregon,[267] South Carolina,[268] Washington,[269] and Wisconsin.[270]

See also Walcek, *supra* note (rejecting takings challenge to issuance of § 404 permit allowing only scaled-down version of proposed development). The *Walcek* court specifically rejected the government's nuisance defense, *see supra* note, but nevertheless approved the character of the government action. *Id.* at 270 (opining that "the existence of the wetland regulations in question, as well as their application to the Property, indisputably serve an important public purpose—one which benefits plaintiffs as members of the public at large"). The court concluded, "while the absence of a nuisance certainly cuts in favor of a finding of a taking, other circumstances in this case [including the importance of preserving ecologically significant areas and the general applicability of wetland regulations to all similarly situated property owners] ameliorate somewhat the impact of the [character of the government action] *Penn Central* factor in this regard." *Id.*

See also Forest Properties, supra note (rejecting takings challenge to denial of § 404 permit to convert lake-bottom property into residential development). The *Forest Properties* court specifically rejected the government's nuisance defense, but nevertheless found that the developer lacked reasonable investment-backed expectations because at the time the developer acquired an option to purchase lake bottom property, "the Corps' guidelines governing the issuance of Section 404 permits under the Clean Water Act had been in effect for a number of years," making clear that "filling wetlands to construct housing on the reclaimed land was disfavored and that it was most unlikely that such a project would be approved." *Id.* at 1366-67.

[261] *See* R&Y, Inc. v. Anchorage, 34 P.3d 289 (Alaska 2001) (rejecting regulatory taking challenge to municipal regulation prohibiting development within 100 feet of particular wetland). In upholding the uncompensated governmental regulation, the Court noted the ecosystem services provided by wetland, concluding, "In preserving the valuable functions of wetlands, regulations like those of the [municipality of Anchorage] provide ecological and economic value to the landowners whose surrounding commercially-developed land is directly and especially benefited by the functioning of Blueberry Lake." 34 P.3d at *298. The Court was influenced, in part, by the comprehensive nature of wetlands regulation.

[262] *See* Florida v. Burgess, 772 So. 2d 540 (Fla. App. 2000) (rejecting regulatory taking challenge to denial of dredge-and-fill permit for construction of dock, boardwalk, and camping shelter on undeveloped 160-acre wetland). The court rejected the claim that an undeveloped wetland was valueless, concluding that the landowner "utterly failed to demonstrate that the permit denial deprived him of all reasonable economic use of his land." *Id.* at 543

See also Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981) (in pre-*Lucas* decision, rejecting regulatory taking challenge to denial of development permit that would have destroyed 1800 acres of black mangrove wetland). In upholding the denial of the permit application, the Court noted that, under the facts of the case, wetland development would pollute the surrounding bays and "cause a public harm." *Id.* at *1382-83 (stressing "the magnitude of [the] proposed development and the sensitive nature of the surrounding lands and water to be affected by it").

[263] *See* K&K Construction, Inc. v. Dep't of Envt'l Quality, 705 N.W. 2d 365 (Mich. App. 2005) (reversing trial court takings award in amount of $16.5 million for denial of application for dredge-and-fill permit). The court concluded that that the permit denial would prevent significant harm to the public. *Id.* at 530 (citing to findings of state legislature that the "loss of a wetland may deprive the people of the state of some or all of the . . . benefits to be derived from the wetland"). The court was cognizant that its decision would prevent the developer from externalizing the costs of wetland destruction: "Indeed, were we to uphold the trial court's award, we would, in effect, single out plaintiffs *to their benefit,* [by] compensating plaintiffs for the loss of value of their property, especially when it has a significant amount of value and development potential remaining. . . . " *Id.* at 563. *See also* Glass v. Goeckel, 703 N.W. 2d 58 (Mich. 2005), *rehearing*

Although the nuisance determination is heavily fact-specific, the cases provide fertile ground for extracting the factors likely to influence courts in future litigation. It is useful to group those factors according to the relevant prong of the three-part analysis established in *Penn Central.*

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denied, 703 N.W. 2d 188 (Mich. 2005), *cert. den. sub nom* Goeckel v. Glass, 126 S.Ct. 1340 (2006) (generously interpreting the public trust doctrine to extend along the Great Lakes to the ordinary high water mark landward of the wet sand).

[264] *See* Claridge v. New Hampshire Wetlands Board, 485 A.2d 287, 292 (N.H. 1984) (in pre-*Lucas* decision, holding that denial of permit to fill tidal marshes was not a taking because filling the marsh would harm the public by irreparably diminishing the marsh's nutrient-producing capability for coastal habitats and marine fisheries). The court consciously grounded its decision in the new learning on wetlands, observing that "[t]he dangers associated with filling wetlands have only recently become widely known"). *Id.* at 292.

[265] American Dredging Co. v. Dep't of Envt'l Protection, 391 A.2d 1265, 1270 (N.J. 1978) (in pre-*Lucas* decision, holding that there is "no absolute right to change the essential character" of land). In 2006, however, the New Jersey Supreme Court required the state to compensate a landowner who had been precluded from building two single-family homes in a river floodway, even though the Court acknowledged "the laudatory goal of limiting flood damage and loss of life along the river," and that the regulation prevented a public danger to the community. Mansoldo v. State, 898 A.2d 1018, 1020-24 (N.J. 2006).

[266] *See* Kim v. City of New York, 681 N.E. 2d 312 (N.Y. 1997).

[267] *See* Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (Ore. 1993), *cert. den.* 510 U.S. 1207 (1994) (rejecting takings claim where common law doctrine of custom precluded hotel from erecting sea wall on dry sand area of Oregon beach).

[268] *See* Grant v. S. Carolina Coastal Council, 461 S.E. 2d 388, 391 (S.C. 1995) (rejecting takings claim where landowner precluded from filling critical area tidelands under state tidelands statute). *But see* Lucas v. S. Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992) (remand) (asserting, "We have reviewed the record and heard arguments from the parties regarding whether [the state] possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land. [The state] has not persuaded us that any common law basis exists by which it could restrain Lucas' desired use of his land; nor has our research uncovered any such common law principle.").

[269] *See* Orion Corp. v. State, 747 P.2d 1062, 1073-83 (Wash. 1987), *cert. den.* 486 U.S. 1022 (1996) (rejecting takings claim where construction permit denied under public trust doctrine).

[270] *See* Just v. Marinette County, 201 N.W. 2d 761 (Wis. 1972) (in pre-*Lucas* decision, rejecting takings challenge to county shoreland zoning ordinance establishing buffer zone along navigable lakes and rivers along which the natural character of the land may not be changed without a conditional use permit). The Court noted that the challenged ordinance was designed to protect navigable waters and public rights from degradation and deterioration, and observed "the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty." 201 N.W.2d at 765, 768-69. *See also* Blumm, *supra note*, at 344-46 (discussing the "natural use doctrine" of *Just* and its progeny).

In a *Penn Central* analysis, courts first consider the economic impact of the challenged regulation.[271] In *Lucas*, the United States Supreme Court accepted a case where the state supreme court had previously found that the challenged regulation rendered the subject property "valueless."[272] Subsequent courts, however, have demonstrated a less skeptical view of the worth of natural lands, perhaps reflecting the evolution of scientific knowledge on the value of wetlands and other aquatic resources.[273] Moreover, even where wetland regulation has deprived property of all value, the landowner may be required to demonstrate a reasonable expectation that development would be allowed under the existing regulatory climate.[274]

Under the second *Penn Central* factor, courts consider the landowner's reasonable investment-backed expectations.[275] Wetland regulators have survived takings liability in numerous cases due to the longstanding and comprehensive regulation of wetlands under state and federal law. Some courts have invoked the so-called "notice rule,"[276] finding that landowner expectations of wetland development cannot be reasonable for properties acquired after the effective date of the federal Clean Water Act of 1972.[277] Other courts date the federal regulatory presence back to the Rivers and Harbors Act of 1899, rendering vulnerable

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[271] Cite.

[272] *See supra* note.

[273] *See, e.g., Burgess, supra* note. The court was influenced, in part, by the facts that "the extensive, remote wetlands adjacent to appellee's property have remained undeveloped as has [the claimant's] property," and that the claimant had made recreational use of his undeveloped property for decades without the sought amenities. *Id.* at 543-44. *See also Gove, supra* note 258, 831 N.E. 2d at 872-73 (finding undeveloped coastal property to be worth at least $23,000).

[274] *See* Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (affirming grant of summary judgment in favor of federal defendant in takings challenge to denial of § 404 permit, and asserting that the "*Lucas* Court did not hold that the denial of all economically beneficial or product use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations of developing his land").

[275] Cite.

[276] In Palazzolo v. Rhode Island, the United States Supreme Court rejected the proposition that the purchase of lands subject to an existing regulatory scheme serves as an *automatic* bar to compensation. Five Justices agreed to invalidate the so-called *notice rule*, under which a purchaser or successive title holder of an earlier-enacted restriction is barred from asserting a regulatory takings claim. *See* 533 U.S. at 626-27 (Kennedy, J., joined by Rehnquist, O'Connor, Scalia, and Thomas, J.J.). Two Justices would find that the regulatory regime in place at the time the claimant acquires the property helps to shape the reasonableness of the claimant's investment-backed expectations under a *Penn Central* analysis. *See* 533 U.S. at 632-36 (O'Connor, concurring) and 533 U.S. at 655 (Breyer, J., dissenting).

[277] *See, e.g., Norman, supra* note; *Brace, supra* note; *Good, supra* note (granting government's motion for summary judgment on basis that landowner lacked expectations); *Forest, supra* note.

development expectations for regulated lands purchased any time after that date.[278] Development expectations are also more likely to fail the reasonableness test when held by sophisticated or commercial landowners who may be held to a higher standard of subjective awareness of the relevant regulatory restrictions on wetland development.[279]

Finally, courts consider the character of the government action under *Penn Central*.[280] Whereas some courts have viewed the existence of a pervasive regulatory scheme as evidence that development expectations are unreasonable,[281] other courts have considered such regulations as evidence that the government action is of an acceptable character. According to this view, the more pervasive the statutory program, the more likely it is to promote an "average reciprocity of advantage," treating all similarly-situated landowners equally, and spreading the burden of regulation across a wider spectrum of property.[282] Courts are also more likely to find a reciprocity of advantage where surrounding properties are similarly restricted.[283] Moreover, courts are increasingly willing to uphold government actions intended to protect ecosystem services against harmful development activities.[284] Finally, if governmental actions are demonstrated to abate a nuisance—even outside the context of a *total taking* under *Lucas*—some courts have found this to be a complete defense to liability, without consideration of the additional *Penn Central* factors.[285]

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[278] *See Walcek, supra* note (pre-*Palazzolo* decision).

[279] *See Norman, supra* note, at 531 (involving "sophisticated investors"); K&K, *supra* note (stating that "plaintiffs are experienced commercial land developers who clearly had or were on notice of the [state] wetland regulations.").

[280] Cite.

[281] *See supra* notes.

[282] *See R&Y, supra* note, 34 P.3d at *298 (observing that Anchorage's setback restriction was "part of a city-wide (indeed, nationwide) wetlands preservation scheme which applies broadly to all landowners and which benefits both the public generally and the landowners in particular"); *K&K, supra* note, 705 N.W. 2d at 531 (opining that wetland regulations, "much like traditional zoning regulations, [are] comprehensive, universal, and ubiquitous").

[283] *See Burgess, supra* note; *Walcek, supra* note; *Florida Rock, supra* note.

[284] *See Palazzolo, supra* note; *R&Y, supra* note; *Graham, supra* note ; *K&K, supra* note; *Claridge, supra* note; *American Dredging, supra* note; *Machipongo, supra* note.

[285] *See also Norman, supra* note (discussing background principles); *John R, supra* note (in context of physical taking, finding that nuisance can serve as background principle precluding liability); and Machipongo, *supra* note. *See also Blumm, supra* note 178, at (discussing *Lucas'* unanticipated consequence of spawning a categorical *defense* to regulatory takings claims).

3. *Wetland Protection as Offensive Claim*

> Because wetlands are critical to flood control, water supply, water quality, and, of course, wildlife, their rapid disappearance is setting the stage for what may eventually become a significant environmental catastrophe.
>
> Sabine River Authority v. U.S. Dep't of the Interior (1992)[286]

Perhaps stimulated by *Lucas's* focus upon the potential link between nuisance and wetland development, lower courts have increasingly recognized the value of wetlands. Going beyond mere rhetoric, in the wake of *Lucas,* at least one court has found that wetland destruction constitutes an affirmative nuisance. In Cook v. Sullivan, the New Hampshire Supreme Court held that constructing a home on jurisdictional wetlands constituted a private nuisance.[287] Most noteworthy is the court's remedy, which required the defendants to move the offending house and foundation a distance of approximately fifty feet.[288] Although acknowledging the severity of the remedy, the trial court—as affirmed by the state supreme court—found such measures to be justified where the defendants deliberately ignored the obvious presence of wetlands and filled them without a permit.[289]

B. Sprawl as New Nuisance

> There is a connection . . . between the fact that the urban sprawl we live with daily makes no room for sidewalks or bike paths and the fact that we are an overweight, heart disease-ridden society.
>
> Center for Disease Control and Prevention (2002)[290]

> [Urban] sprawl has left some densely populated U.S. regions vulnerable to flooding on a similar scale to what the Gulf Coast suffered after Hurricane Katrina.[291]

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[286] Sabine River Authority v. U.S. Dep't of the Interior, 951 F.2d 669, 671-72 (5th Cir. 1992) (describing wetlands as "an ecological treasure"). *See also* Allison v. Barberry Homes, Inc., 2000 WL 1473121, *3 (Mass. Super. 2000) (rejecting "ironic" claim that *creation* of wetland constitutes a private nuisance, and stating that wetlands "are a precious resource—not a nuisance").

[287] Cook v. Sullivan, 829 A.2d 1059 (N.H. 2003) (finding private nuisance where defendants' construction caused standing water to accumulate in and beneath structures on neighboring property of plaintiffs).

[288] *Id.* at 1067-68.

[289] *Id.*

[290] Richard J. Jackson & Chris Kochtitzky, *Creating a Healthy Environment: The Impact of the Built Environment on Public Health* 11 (2002), *available at* www.sprawlwatch.org (citing study by researchers at the National Center for Environmental Health, Center for Disease Control and Prevention).

The pattern of sprawling land use typically associated with low density, suburban housing has engendered both detractors and supporters. Although the negative impacts of sprawl have received considerable study, many suburban developers and residents vigorously support the "right to sprawl,"[292] citing to the privacy, convenience, and safety they believe the suburban landscape provides.[293] In appropriate cases, new nuisance theory might be a tool capable of balancing such perceived benefits and detriments, ensuring that a fair share of the negative costs of sprawl are borne by those who generate them. A growing body of literature has documented the adverse, nuisance-like impacts of sprawl.

1. The New Learning on Sprawl

a. Economic impacts: Perhaps the best-studied impacts of sprawl are those of an economic nature. Low-density development increases the per-capita cost of infrastructure such as roads, sewer lines, and water lines.[294] In addition, the isolation of residential land uses from areas zoned for shopping, employment, and service centers causes increased dependence upon the automobile, which in turn causes increased air pollution, traffic congestion, and gasoline consumption. Providing a classic illustration of externalities, these costs may be reflected in the taxes of the entire region, whereas the benefits of sprawl may be enjoyed primarily by suburban residents.[295] For example, a Rutgers University study found

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[291] *Scientists: California, St. Louis Risk Katrina-Level Floods,* USA TODAY, Feb. 19, 2006, *available at* http://www.usatoday.com/tech/science/2006-02-19-flooding_x.htm?POE=click-refer (citing Jeffrey Mount, University of California, for proposition that "[urban] sprawl has left some densely populated U.S. regions vulnerable to flooding on a similar scale to what the Gulf Coast suffered after Hurricane Katrina")

[292] Lester Graham, *The Right to Sprawl,* May 5, 2003, available at http://www.glrc.org/transcript.php3?story_id=1888.

[293] *See* Bill Bishop, *Urban Sprawl Makes Comeback,* LEXINGTON-HERALD-LEADER, Mar. 14, 1999, at F1 ("Sprawl doesn't hurt anybody. . . . [It] is the American dream."), *cited in* Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 UNIV. PENN. L. REV. 873, 874 n.4 (2000).

[294] *See* ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS I23-24 (1999) (citing study by Urban Land Institute), *cited in* Dowling, *Reflections, supra*, at 875 n.16. The cost of sprawl has also been studied at the state-wide level. *See, e.g.,* Maine State Planning Office, *The Cost of Sprawl* 10 (1997), *available at* http://www.state.me.us/spo/files/spraw (finding that expenditures for education, roads, and police by Maine state and local governments "increased in real dollars . . . during the 1980s [by] a total of over $1300 per Maine household" and concluding that "[i]t is beyond dispute that the spreading out of Maine families is a major contributing factor to the overall increase"), *cited in* Dowling, *supra* at 876 n.17

[295] *See, e.g.,* Lester Graham, *Hidden Costs of Sprawl,* GREAT LAKES RADIO CONSORTIUM, June 24, 2002, *available at* www.glrc.org/transcripts/2002/06/24/graham.htm; MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY (2002).

that prohibiting sprawl would have an economic impact of $357 million upon a limited number of landowner/developers over twenty years, whereas permitting sprawl would cost state residents $8 billion for otherwise unnecessary infrastructure.[296]

b. *Environmental impacts*: Sprawling development exacerbates a variety of environmental problems. It increases air pollution by increasing automobile dependence, which in turn generates additional pollution in the operation of cars and in the production of gasoline to fuel them. In addition, low-density development increases the consumption of wildlife habitat, agricultural lands, and water, as such areas may give way to suburban lawns, described by one researcher as "the largest irrigated crop in the U.S."[297] Sprawl also increases water pollution, either through the application of nitrogen-rich fertilizers to large suburban lawns or through the use of septic tanks as an inexpensive alternative to municipal sewer lines.[298] Furthermore, the conversion of forests and farmland to suburban development has been linked to climate change and global warming.[299]

c. *Human health and safety impacts*: The association between air pollution, respiratory illness, and sprawl has long been studied. More recently, researchers have begun to explore the link between urban design and an expanded range of health impacts, including heart disease, diabetes, obesity, asthma, and depression.[300] The sprawl-obesity link has received particular attention.[301] An

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[296] *See* Robert W. Burchell et al., *Impact Assessment of the New Jersey Interim State Development and Redevelopment Plan* (Rutgers Univ., Ctr. for Pol'y Research, 1992), *cited in* Henry R. Richmond, *Sprawl and Its Enemies: Why the Enemies are Losing,* 34 CONN. L. REV. 539, 577-78 (2001).

[297] *See* Elizabeth Weise, *As Suburbs Grow, So do Environmental Fears,* USA TODAY, Dec. 30, 2005 (quoting Jennifer Jenkins, professor of environmental economics at the University of Vermont).

[298] *Id.* (citing December 2005 report by the American Geophysical Union, an international association of scientists).

[299] *See* Amy Meersman, *NCAR Study: Land Use Affects Climate,* DAILY CAMERA (Boulder), Dec. 9, 2005 (citing study by the National Center for Atmospheric Research indicating that deforestation will add at least two degrees Celsius to Amazon surface temperatures by the year 2100); National Resources Conservation Service, U.S. Dep't of Agric., 1997 National Resources Inventory Highlights 1 (1999) (documenting doubling of national rate of development from 1982-1992 to 1992-1997, and noting development of six million acres of U.S. forest, farmland, and private open space from 1992-97). In contrast, the expansion of agricultural lands can counteract global warming by as much as 50% across various portions of North America, Europe, and Asia. Meersman, *supra.*

[300] From 1960-97, vehicle miles traveled in the United States increased by more than 250%. Jackson & Kochtitzky, *supra,* at 6, citing U.S. Dep't of Transportation, Bureau of Transportation Statistics, *Journey-to-Work Trends in the United States and its Major Metropolitan Areas, 1960-1990*, *available at* http://ntl.bts.gov/DOCS/473.html. The average annual driving time of American drivers is 443 hours, the equivalent of 11 work weeks. Jackson & Kochtizky, *supra*, at

emerging subset of the sprawl literature studies the phenomenon of "school sprawl"—the siting of sprawling, single-story, modern schools at the edge of town or in areas lacking sidewalks and bicycle paths.[302] Increasingly, children are unable to walk to school, which in turn increases the occurrence of inactivity-related ailments.[303] With respect to public safety, some scientists have suggested that sprawling population patterns may increase the danger of flood-related harm. They believe that "[u]rban sprawl has left some densely populated U.S. regions vulnerable to flooding on a similar scale to what the Gulf Coast suffered after Hurricane Katrina," including the Sacramento-San Joaquin Delta of California and a fourteen thousand acre zone in the Mississippi River floodplain of St. Louis.[304] One researcher has asked, "If we knew about [Hurricane] Katrina 200 years ago, would we have done the same thing again in New Orleans? . . . Well, in California we are reinventing our own Katrina as we speak.[305]

d. Social and intangible impacts: Some studies indicate that deconcentrated land patterns contribute to abandonment of urban communities, undercuts economic productivity, denies equal opportunity, destabilizes older suburbs, undercuts education investments, reduces public safety, and worsens traffic congestion.[306] Other work suggests that sprawl may contribute to the

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6, *citing* CARL POPE, SOLVING SPRAWL (Sierra Club 1999), *available at* http://www.sierraclub.org/sprawl/report99/index.asp.

[301] Among American adults, 64.5% are overweight and 30.5% are obese, leading to more than 300,000 premature deaths annually. Such weight-related deaths are the second leading cause of preventable death, following tobacco-related deaths. Reid Ewing et al., *Relationship Between Urban Sprawl and Physical Activity, Obesity, and Morbidity,* 18 AMERICAN J. OF HEALTH PROMOTION 47, 54 (September/October 2003) (peer-reviewed study) (citing various studies published in the Journal of the American Medical Association). *See also* Russ Lopez, *Urban Sprawl and Risk for Being Overweight or Obese,* 94 AMERICAN J. OF PUBLIC HEALTH 1574 (2004)*;* Arlin Wassereman, *Gaining Weight: Michigan Sprawl Increases Waistlines, Health Care Costs,* MICH. LAND USE INSTITUTE, Mar. 31, 2003; SMART GROWTH AMERICA & SURFACE TRANSPORTATION POLICY PROJECT, MEASURING THE HEALTH EFFECTS OF SPRAWL (2003) (finding that "[r]esidents of sprawling counties were likely to walk less during leisure time, weigh more, and have a greater prevalence of hypertension than residents of compact counties").

[302] *See generally* David Goldberg, *Sprawl vs. Small: When Can Johnny Walk to School Again,* MICHIGAN LAND USE INSTITUTE, Sept. 16, 2005, *available at* http://mlui.org/print.asp?fileid=16920.

[303] Between 1969 and 2001, the percentage of students who commuted to school by foot or bicycle decline from approximately 50% to 10%, while childhood obesity rose to 30%. *Id.* In one county study, "57% of school principals rated the area around their schools as moderately to extremely dangerous for kids on foot or bicycle." *Id.* (citing study by Dekalb County Health Department).

[304] *Scientists: California, St. Louis Risk Katrina-Level Floods,* USA TODAY, Feb. 10, 2006, http://www.usatoday.com/tech/science/2006-02-19-flooding_x.htm?POE=click-refer.

[305] *Id.* (quoting presentation of Jeffrey Mount, University of California, at annual conference of the American Association for the Advancement of Science).

[306] *See* Richmond, *supra* note 296, at 20.

economic and racial segregation of residential neighborhoods. As early as 1968, the National Advisory Commission on Civil Disorders recognized a connection between land use patterns and racial segregation.[307] Anecdotal subjective evidence suggests that, for some, sprawl may lead to a decline in community welfare and individual happiness.[308] These subjective claims are bolstered by objective data indicating that sprawl-induced traffic congestion may cost Americans seventy-two billion dollars annually in lost time and fuel[309] and over two hundred lives annually that are lost to road rage.[310] Popular support for anti-sprawl measures also suggests widespread dissatisfaction with sprawling development.[311]

2. Defending Sprawl Regulations

Among the measures taken by local governments today to curb sprawl, zoning regulations are perhaps the most common. For example, in response to the trend toward the "supersizing" of houses, some municipalities have amended their zoning ordinances to set maximum limits on square footage or lot coverage.[312]

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[307] The report suggested,

> Most new employment opportunities . . . are being created in suburbs and outlying areas—and this trend is likely to continue indefinitely. . . . [The exclusion of blacks from this emerging suburban work force would become] the single most important source of poverty among Negroes [and a principle source of family and social disorganization.]

REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam Books 1968), *cited in* Richmond, *supra*, at n.127.

[308] *See, e.g., Letter to the Editor*, USA TODAY, June 4, 2002, at A12 (claiming, that "[u]nchecked sprawl has worsened environmental conditions, has bred a wasteland of mega-marts and malls and, frankly, has diminished the quality of life"); Dowling, *supra* note, at 874 n.18 (concluding that "unchecked sprawl has shifted from an engine of California's growth to a force that now threatens to inhibit growth and degrade the quality of our life") (citing study sponsored by the Bank of America, California Resources Agency, Greenbelt Alliance, and the Low Income Fund); David A. Dana, *Existence Value and Federal Preservation Regulation,* 28 HARV. ENVT'L L. REV. 3343 (2004).

[309] Dowling, *supra* note 293, at 875 (citing to report by Texas Transportation Institute) (finding that "Washington, D.C. residents waste about seventy-six hours each year in traffic jams at a cost of about $1260 per person.").

[310] Dowling, *supra* (citing to 1996 data reported by the AAA Foundation for Traffic Safety).

[311] Dowling, *supra,* at 877 and n.24 (noting that voters in 1998 approved over 70% of the 240 sprawl-control ballot initiatives, and reporting comments in support of smart growth and open space protection by 34 governors in 1998 inaugural remarks or "state of the state" speeches).

[312] *See* Tom Kenworthy, *Oversize Homes Wear Out Welcome,* USA TODAY, Feb. 21, 2006 (describing Aspen, Colorado ban on homes exceeding 15,000 square feet, and Arlington County, Virginia's limitation of building footprint to 30% of lot).

Zoning has also been used as a weapon against the proliferation of "big box" stores, with their perceived ability to sap traditional downtowns of their economic vitality.[313] The legitimacy of zoning is well established, and challenges to sprawl-preventing restrictions have been largely unsuccessful.[314]

As early as 1926, the Supreme Court upheld the authority of local communities to enact comprehensive zoning ordinances.[315] Ironically, traditional zoning fostered the very type of low-density, use-separating, sprawling development that modern regulations seek to prevent. For example, in Village of Belle Terre v. Boraas, the 1974 Court upheld in poetic terms the government's discretion to promote the kind of development that some today might criticize as sprawl:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people. . . .[316]

Later, zoning ordinances would be used by some communities to limit undesirable sprawling development. Almost thirty years ago, the Court specifically endorsed sprawl prevention as a valid objective of zoning. In Agins v. City of Tiburon, the Court upheld the authority of government to address "air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl."[317]

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[313] *See Symposium 2005: The Big Box Challenge,* 6 VERMONT J. ENVT'L L. (2004-2005).

[314] *See generally,* Dowling, *supra* 293, at 884 (2000); Lora A. Lucero & Harrison T. Higgins, *Citizens Taking Matters into Their Own Hands*, 37 URB. LAW. 607 (2005); Chris J. Williams, *Do Smart Growth Policies Invite Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States,* 55 ALA. L. REV. 895 (2004); Robert H. Freilich, *Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis,* 24 U. HAW. L. REV. 589 (2002); James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life under the Takings and Other Provisions,* DICK J. ENVT'L L. & POL'Y 421 (2001); William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique,* 35 WAKE FOREST L. REV. 509 (2000). *But see* Richmond, *supra* note 296.

[315] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding local zoning ordinance as valid exercise of authority and rejecting facial attack).

[316] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding village's goals as permissible exercise of police power).

[317] Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (asserting that it has "long . . . been recognized as legitimate [for local governments to regulate] the premature and unnecessary

Following the lead of the Supreme Court, many lower courts have upheld sprawl-control measures against challenges brought under the fifth amendment and under a variety of other constitutional theories. In cases where the government has prevailed, courts generally emphasize the nuisance-like aspects of sprawl, concluding that the government has ample authority for its prevention. In cases decided before *Lingle,*[318] this type of analysis is particularly pronounced, with some courts conflating the issues of whether a particular ordinance is a valid exercise of governmental authority, and whether the exercise of such authority constitutes a regulatory taking.[319] After *Lingle,* courts have continued to support the validity of sprawl control measures.[320] In a closely-watched California case, for example, the City of Turlock adopted a zoning ordinance clearly aimed at preventing the development of a Wal-Mart store.[321] In rejecting Wal-Mart's challenge to the ordinance, the court noted with approval the legislative purposes of "protect[ing] against urban/suburban decay, increased traffic, and reduced air quality, all of which, according to the City, can result from the development of discount superstores."[322]

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conversion of open-space land to urban uses"), *disapproved on other grounds,* First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987). *See also* Tahoe-Sierra Preservation Council, Inc. v. TRPA, 535 U.S. 302 (2002) (holding that moratorium on development imposed during the process of devising a comprehensive land-use plan does not constitute a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution).

[318] *See supra* Part II.D.

[319] *See, e.g.,* Windward Marina v. City of Destin, 743 So.2d 635, 639-40 (Fla. App. 1999) (rejecting takings challenge to denial of permit to construct dry-dock marina, and evaluating resultant increased boat traffic in context of nuisance law); Loretto Development Co., Inc. v. Village of Chardon, 149 F.3d 1183 (6th Cir. 1998) (unpublished opinion) (rejecting takings challenge to denial of landowner's proposal to re-zone property to permit construction of Wal-Mart store); Dodd v. Hood River County, 136 F.3d 1219, 1229-30 (9th Cir. 1998) (rejecting takings challenge to zoning ordinance preventing landowners from building home in forest use zone, and citing with approval governmental interest in protecting commercial timber practices against the adverse consequences of sprawl).

[320] *See, e.g.,* Peste v. Mason County, 136 P.3d 140, 144, 150 (Wash. App. 2006) (rejecting takings challenge to denial of rezoning petition to allow increased residential density, and noting with approval county's goal of reducing sprawl).

[321] *See* Wal-Mart Stores, Inc. v. City of Turlock, 138 Cal. App. 4th 273 (2006) (rejecting police power and state law challenge to zoning ordinance). The challenged zoning provision "would limit the ability of 'big box' retailers to sell nontaxable items such as groceries." *Id.* at 280.

[322] *Id.* at 281, 301. *See also In re* Wal-Mart Stores, Inc., 207 A.2d 397 (Vt. 1997) (upholding Vermont's Act 250).

3. *Sprawl Protection as Offensive Claim*

> A public way is obstructed just as effectively by a pattern of low-density development that over time generates more auto trips than roads can handle, as by an ox cart abandoned in the middle of a road.[323]

Sprawl presents a more tenuous case for nuisance than does wetland destruction. Unlike the latter—which may even support an affirmative action for nuisance abatement—in the case of sprawl it may be difficult to trace causation and to prove sufficient injury for standing. As one commentator has noted, "[traditional] nuisances hurtled directly and immediately across property lines and substantially harmed a clearly identifiable, usually adjacent, rural landowner and perhaps a few others."[324] In contrast, this commentator notes, "a subdivision or shopping mall at the metropolitan fringe affects people in the interior from a considerable distance, in an indirect manner . . . and affects many people a little instead of one or a few people a great deal."[325] Even if these problems of injury and causation can be overcome, the very pervasiveness and success of land use regulations such as zoning poses hurdles to the affirmative nuisance suit. Otherwise viable common law actions may be preempted by complementary legislative efforts to curb sprawl.[326]

C. *Global Warming as New Nuisance*

1. *The New Learning on Global Warming*

As the composition of the earth's atmosphere changes, more of the sun's energy is trapped rather than radiated back into space.[327] This change is brought about by the emission of so-called "greenhouse gases," including carbon dioxide, nitrous oxide, methane, hydroflourocarbons, sulphur hexafluouride, and perfluorochloride.[328] About seventy-five percent of the carbon dioxide emitted by

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[323] Richmond, *supra* note 296, at 577-78 (2001) (arguing that "[p]ublic health is threatened just as much by airborne emissions from millions of tailpipes as by the airborne germs from rotting hog carcasses or a malarial pond").

[324] *Id.* 577-78 (2001).

[325] *Id.*

[326] *Id.* (arguing that the "apparently slam-dunk nuisance lawsuit is not viable because state legislatures have supplanted common-law nuisance principles with sprawl zoning. The argument would have to be that because 1920s style zoning does not attempt to assess the metro-wide impacts of many modern land uses, zoning statutes do not pre-empt nuisance claims").

[327] *See generally,* Environmental Protection Agency, *Global Warming, available at* http://yosemite.epa.gov/oar/globalwarming.nsf.

[328] The first three greenhouse gases occur both naturally and as byproducts of human activities, whereas the remaining three gases are not naturally occurring. *Id.* at *Global Warming—Emissions.*

humans during the past two decades can be attributed to the burning of fossil fuels (primarily by automobiles and power plants), with additional emissions attributable to deforestation and other land use changes.[329]

Perhaps the best scientific consensus on climate change (including global warming) is provided by the Intergovernmental Panel on Climate Change (*IPCC*), established in 1988 by the World Meteorological Organization and the United Nations Environment Programme.[330] The IPCC has issued a series of "assessment reports," the most recent of which was released in summary form in February 2007.[331]

Although the human causes of global warming are subject to a measure of dispute, they have been identified with an increasing degree of confidence over time. In 2001, the IPCC asserted that although natural factors have made "small contributions" to global warming, "concentrations of atmospheric greenhouse gases and their radiative forcing have continued to increase as a result of human activities."[332] In response, in 2001 the United States agreed that the increase in surface air temperatures and subsurface ocean temperatures over the past several decades "are likely mostly due to human activities," but added, "we cannot rule out that some significant part of these changes is also a reflection of natural variability."[333] The IPCC's subsequent report, *Climate Change 2007,* concluded, "[t]he understanding of anthropogenic warming and cooling influences on climate has improved since the Third Assessment Report, . . . leading to *very high confidence* that the globally averaged net effect of human activities since 1750 has been one of warming. . . ."[334] The IPCC added that the rate of increase of radiative forcing during the industrial era "due to increases in carbon dioxide, methane, and nitrous oxide . . . is *very likely* to have been unprecedented in more than 10,000 years."[335]

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[329] Intergovernmental Panel on Climate Change, *Climate Change 2001: The Scientific Basis* 7 (2001).

[330] Cite.

[331] Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis: Summary for Policymakers* (approved February 2007), *available at* http://www.ipcc.ch/.

[332] *Climate Change 2001, supra* note 329, at 6-9 (defining "radiative forcing as "a measure of the influence a factor has in altering the balance of incoming and outgoing energy in the Earth-atmosphere system, and [as] an index of the importance of the factor as a potential climate change mechanism"). *See also id.* at 10 (asserting, "[t]here is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities").

[333] NATIONAL ACADEMY OF SCIENCES, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 1 (2001).

[334] *Climate Change 2007, supra* note 331, at 3 (emphasis in original).

[335] *Id.* (emphasis in original).

The IPCC predicts a variety of climate changes by the end of the twenty-first century, including an average surface temperature increase of 1.8 to 4.0 degrees centigrade, and a rise of global mean sea level of 0.18 to 0.59 meters.[336] Moreover, the IPCC finds that increases in tropical cyclone (typhoon and hurricane) wind and precipitation intensities are "likely."[337]

2. Defending Climate Regulations

As discussed in the previous two sections, wetland destruction and land use patterns are regulated by well-developed legislative schemes under the Clean Water Act and local zoning ordinances, respectively. Those seeking to avoid such regulation have claimed, *inter alia,* that it constitutes a regulatory taking for which compensation is required—a claim that may be refuted in some cases by a new nuisance defense. Surprisingly, this same pattern has not appeared in the context of global warming regulation.[338] That is, opponents of the emerging law have not challenged it under the fifth amendment regulatory takings doctrine.[339]

The most obvious explanation for this absence of takings litigation is quite simple: there is little or no regulation in existence to serve as the target of a challenge, either at the federal or state levels. In fact, at the federal level, it is those who support regulation—and not property rights advocates opposing it—who have filed suit. For example, in *Massachusetts v. Environmental Protection Agency*[340] the issue is whether the states and others can *compel* the federal

[336] *Id.* at 11 (predicting changes at years 2090-2099 relative to 1980-1999).

[337] *Id.* at 7, 12. *See also* P.J. Webster et al., *Changes in Tropical Cyclone Number, Duration, and Intensity in a Warming Environment,* 309 SCIENCE 1844 (Sept. 16, 2005) (concluding that "global data indicate a 30-year trend toward more frequent and intense hurricanes," and that "[t]his trend is not inconsistent with recent climate model simulations that a doubling of CO_2 may increase the frequency of the most intense cyclones, although attribution of the 30-year trends to global warming would require a longer global data record and, especially, a deeper understanding of the role of hurricanes in the general circulation of the atmosphere and ocean").

[338] *See supra* notes and accompanying text.

[339] For a summary of the global warming lawsuits pending as of February 5, 2007, *see* Justin R. Pidot, *Global Warming in the Courts* (Georgetown Environmental Law & Policy Institute) (Nov. 2006 & Feb. 5, 2007 Supp.), http://www.law.georgetown.edu/gelpi/current_research/global_warming_litigation/global (last visited Feb. 10, 2007). The regulation of air pollutants released into the global commons may differ conceptually from the regulation of wetlands filling or other uses of private property. Nevertheless, the regulation of air pollution may also serve as the basis for a regulatory taking claim. *See, e.g.,* D.A.B.E., Inc. v. City of Toledo, 393 F.3d 692 (Fed. App. 2005) (rejecting takings challenge by restaurant and bar owners to city ordinance restricting smoking in enclosed public places).

[340] Massachusetts v. Environmental Protection Agency, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted,* 126 S.Ct. 2960 (2006). Twelve states and others brought an action challenging the Environmental Protection Agency's (EPA) denial of a petition under § 202(a)(1) of the Clean Air

government to regulate greenhouse gases, not whether any such regulation would run afoul of the takings doctrine.

Thus, it may be simply too soon for takings litigation to have materialized, particularly "as-applied" rather than "facial" challenges. As an alternative explanation, could it be possible that regulatory takings challenges will *never* pose a significant hurdle to global warming legislation? That is, as the science on climate change develops, it becomes increasingly apparent that those who pollute the atmosphere with greenhouse gases are unleashing nuisance-like harms upon society. As a result, the *new nuisance* doctrine of *Lucas* may become an increasingly powerful affirmative defense to developing regulation.

This hypothesis may be supported by industry's reaction to California's pioneering effort to regulate greenhouse gases at the state level. Many in the regulated community do not challenge the conclusion that greenhouse gas emissions *should* be regulated; instead, through preemption claims they raise the issue of *which authority* (federal or state) should oversee the regulation. For example, in *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, automobile manufacturers challenged California's 2004 adoption of vehicle emission regulations for greenhouse gases, claiming that the state's action had been preempted by various federal statutes and that the new emission standards would usurp the Federal Transportation Department's authority to regulate fuel economy.[341] Beyond the vehicle emission legislation of 2004, California also enacted groundbreaking state-wide emission caps for stationary as well as mobile sources, through the Global Warming Solutions Act of 2006.[342] At least by year's end, the statute had not been challenged in the courts.[343] Instead, some have called for similar legislation to be enacted on a nationwide scale.

Act, seeking the regulation of carbon dioxide and other greenhouse gas emissions from new motor vehicles. In holding that the EPA properly exercised its discretion in denying the rulemaking petition, the D.C. Circuit concluded that Congress gave the agency considerable discretion under § 202(a)(1) to utilize not only scientific evidence, but also policy judgments in deciding whether or not to regulate specific pollutants. In so concluding, the court cited to a 2001 statement by the National Research Council that "'a causal linkage' between greenhouse gas emissions and global warming 'cannot be unequivocally established.'" The U.S. Supreme Court heard oral argument on November 29, 2006, and a decision is expected spring 2007.

[341] 2006 WL 2734359 (E.D.Cal. 2006) (denying state defendant's motion to dismiss for failure to state a claim). On January 17, 2007, the district court stayed further proceedings pending the Supreme Court's decision in Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted,* 126 S.Ct. 2960 (2006). *See* 2007 WL 135688 (E.D. Cal. 2007).

[342] A.B. 32 (Aug. 30, 2006) (applying emission caps to power plants, oil refineries, cement plants, large dairies, and other major industrial sources).

[343] For other preemption litigation *see* Lincoln Dodge, Inc. v. Sullivan, No. 1:06CV00070 (D. R.I. filed Feb. 13, 2006) (alleging that Energy Policy and Conservation Act and the implied federal foreign affairs power preempt state regulation of motor vehicle emissions); Green Mountain Chrysler-Plymouth-Dodge v. Torti, No. 2:05CV00302 (D. Vt. filed Nov. 18, 2005) (alleging that

3. Climate Protection as Offensive Claim

Climate protection advocates have filed a series of lawsuits challenging atmospheric pollution as nuisance. Although plaintiffs face numerous procedural and substantive hurdles, they are "'edging closer' to at least establishing standing to pursue such actions."[344] Although the likelihood of success is still small, the stakes are enormous. As one practitioner notes, "The prospect of liability is a serious matter. . . . Even if the risk appears to be small in terms of the likelihood of being found liable, the consequences of being held liable are substantial—potentially in the trillions of dollars."[345]

Three cases are noteworthy. First, because the appellants in *Massachusetts v. EPA* had been unsuccessful before the D.C. Circuit in forcing the EPA to regulate carbon dioxide emissions,[346] they brought an offensive nuisance claim as an alternative avenue of relief. In *Connecticut v. American Electric Power Co*., many of the same states and environmental organizations again sought to abate global warming, this time terming it a public nuisance.[347] Plaintiffs targeted five public utility companies as defendants, alleging that they emit one fourth of the carbon dioxide in the United States, and therefore contribute significantly to climate change.[348] Plaintiffs sought a complicated remedy, asking the court to set a cap on each defendant's emission of carbon dioxide, as well as set an emission

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Energy Policy and Conservation Act and the implied federal foreign affairs power preempt state regulation of motor vehicle emissions).

[344] Kristin Choo, *Feeling the Heat: The Growing Debate Over Climate Change Takes on Legal Overtones,* ABA J. 29, 34 (July 2006) (quoting J. Kevin Healy, environmental lawyer in Bryan Cave's New York City office).

[345] *Id.* (quoting John C. Dernbach, co-chair, Sustainable Development, Ecosystems and Climate Change Committee, ABA Section of Environment, Energy and Resources). Dernbach's observations are reminiscent of Judge Learned Hand's articulation of the so-called "Carroll Towing Formula," under which a defendant's duty in tort is a function of three variables: the probability of harm, the gravity of harm, and the burden of adequate precautions. United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947) (Hand, J.) (holding barge company liable in negligence for damage occurring when barge broke away from its mooring during daylight hours when no attendant was aboard the ship). Extrapolating broadly to the context of global warming, the greater the body of evidence that catastrophic climate change is likely to occur, the more reasonable it becomes to impose liability upon atmospheric polluters.

[346] *Massachusetts v. EPA, supra* notes and accompanying text.

[347] Connecticut v. American Electric Power Co., 406 F.Supp. 2d 265 (S.D.N.Y. 2005) (dismissing action as non-justiciable political question), *appeal pending,* Case No. 05-5104-CV (2nd Cir.). *See generally,* Thomas W. Merrill, *Global Warming as a Public Nuisance,* 30 COLUM. J. ENVT'L L. 293 (2005) (doubting success of claim).

[348] *Connecticut v. AEP,* 406 F. Supp. 2d at.

reduction schedule.[349] The court granted defendants' motion to dismiss on the ground that climate change as a public nuisance is a non-justiciable political question.[350] Nevertheless, the court provided instructive language suggesting weaknesses that future environmental plaintiffs might overcome to prosecute successful nuisance actions—indicating that the relief sought was overbroad, revealing the "transcendently legislative nature of [the] litigation."[351]

Two additional cases are more promising for an ultimate recognition of climate change as public nuisance, ruling in favor of environmental plaintiffs on the standing-related issues of injury-in-fact, causation and redressability. In *Friends of the Earth v. Watson*,[352] plaintiffs/environmental organizations alleged that defendants[353] had provided assistance to particular projects that contribute to climate change without complying with the National Environmental Policy Act and the Administrative Procedure Act. The court found that plaintiffs had standing, noting that a more lenient standard should be applied in cases alleging *procedural* statutory violations.[354] Similarly, *Northwest Environmental Defense Center v. Owens Corning Corporation* held that environmental plaintiffs had standing to challenge alleged violations of the Clean Air Act that could promote

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[349] *Id.*. This request would have required defendants to comply with emissions caps that parallel the Kyoto Protocol, which was not ratified by the United States. *Id.*

[350] *Id.*

[351] *Id.* at 265 (describing prayer for court to "enjoin[] each of the defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade"). *See also In Re:* Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 2006 WL 1980639, *5-6 (S.D.N.Y. June 23, 2006) (denying defendant gasoline producers' motion to dismiss on basis of political question doctrine, and distinguishing *Connecticut v. AEP* as a case in which plaintiffs sought quasi-legislative relief when Congress and the Executive had specifically refused to act); Northwest Environmental Defense Center v. Owens Corning Corp., 2006 WL 1594130 at *11 (D. Or. June 8, 2006) (distinguishing *Connecticut v. AEP* as a case where the court was asked "to make a free-wheeling policy choice and decide whether global warming is, or is not, a serious threat or what measures should be taken to remedy that problem").

[352] Friends of the Earth, Inc. v. Watson, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005) (denying defendants' motion for summary judgment).

[353] Defendants are Peter Watson, Chief Executive Officer of the Overseas Private Investment Corporation (OPIC), and Peter Merrill, Vice Chairman and First Vice President of the Export-Import Bank of the United States (Ex-Im). As the court explained, "OPIC, an independent government corporation, offers insurance and loan guarantees for projects in developing countries. . . . Ex-Im, an independent governmental agency and wholly-owned government corporation, provides financing support for exports from the United States." *Id.* (quoting 22 U.S.C. § 2197(a)).

[354] *See id.* at *2 ("When, as here, a plaintiff seeks to challenge a procedural violation, some uncertainty about redressability and causality is allowed."); *see also id.* at *3 ("Here, any concern that Plaintiffs' asserted injuries are caused by third parties must be evaluated in light of lower threshold for causation in procedural injury cases.").

global warming.[355] The court found that plaintiffs had adequately demonstrated causation, even though they relied upon indirect links between cause and effect.[356] In declining to adopt a narrow view of standing, the court rejected the notion—derived from the special injury rule of public nuisance—that "injury to all is injury to none."[357] Under that view, the court explained, "if the proposed action threatened the very survival of our species, no person would have standing to contest it. The greater the threatened harm, the less power the courts would have to intercede. That is an illogical proposition."[358]

4. New Learning on Global Warming as Legislative Catalyst

When the potential threat of climate change first came to the national attention, many in government and industry responded with denial. International efforts to draft and ratify the Kyoto Protocol highlight this opposition in the United States to aggressive regulation. The Clinton administration ultimately agreed through the Kyoto Protocol to reduce U.S. emissions seven percent below 1990 levels, to be achieved by 2012.[359] During its negotiations, however, the administration introduced several stumbling blocks that would continue to be hallmarks of U.S. policy through successive administrations. These hurdles

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[355] Northwest Environmental Defense Center v. Owens Corning Corp., 434 F.Supp. 2d 957 (D.Or. June 8, 2006) (upholding standing in action alleging violations of Clean Air Act § 165(a)).

[356] The court noted,

> Other forecasted impacts from [defendant's] emissions would operate less directly. For instance, ozone-depleting emissions from Defendant's facility must first ascend to the stratosphere before impacting persons on the ground in Oregon. Global warming likewise operates indirectly. Higher sea levels in Oregon will supposedly result from melting ice in the earth's polar regions. . . . Nevertheless, the adverse effects alleged in Plaintiffs' Complaint would be felt by them here in Oregon, and the source of Defendant's emissions would be in Oregon.

Id. at *6, *8 (recognizing more lenient requirement of causation in context of motion to dismiss for lack of standing than in context of merits of tort action).

[357] *Id.* at *6.

[358] *Id. See also* California v. General Motors Corp., No. 3:06CV05755 (N.D. Cal. filed Sept. 20, 2006) (asserting nuisance claim against manufacturer of motor vehicles); Comer v. Murphy Oil, 2006 WL 1474089 (S.D. Miss. Apr. 19, 2006) (asserting third amended complaint in nuisance against oil and gas companies, claiming that their greenhouse gas emissions exacerbated the damage caused by Hurricane Katrina).

[359] DONALD A. BROWN, AMERICAN HEAT: ETHICAL PROBLEMS WITH THE UNITED STATES' RESPONSE TO GLOBAL WARMING 35 (2002). The author had been "a former liaison of the U.S. Environmental Protection Agency to the United Nations from 1995 to 1998, a member of several U.S. delegations to UN negotiations on environmental and development issues, and a long-time observer of the U.S. role in international environmental issues. . . ." *Id.* at xv.

included policy options to reduce the economic impact of compliance, as well as demanding that all nations (both developed and developing) agree to the Protocol.[360] The George W. Bush administration rejected the treaty, citing to scientific uncertainty, as well as to the factors mentioned by the Clinton administration.[361] For its part, the Senate refused to ratify the Protocol.[362] A prominent senator stated, for example, "[a]ny way you measure this, this is a bad deal for America."[363] Similarly, another senator would later denounce the threat of catastrophic global warming as "the greatest hoax ever perpetrated on the American people."[364] Industry, too, mounted an attack on the Protocol, airing commercials that "showed a scissors cutting those countries out of a world map that would not have enforceable emissions targets . . . [thereby suggesting] that a Kyoto treaty would unfairly exempt these nations."[365] Several years later industry would engage in another memorable television advertising campaign, this time in response to the movie, *An Inconvenient Truth*.[366] Showing an attractive, pigtailed young girl blowing onto a dandelion stalk to scatter its seeds, the narrator states, "[carbon dioxide] is essential to life [because] we breathe it out." The narrator concludes, referring to carbon dioxide, "They call it pollution. We call it life."[367]

Over time, there has been a reversal of attitudes among political and industrial leaders about the seriousness of the threat posed by global warming. In response, some have called for governmental measures to encourage voluntary efforts to protect the global atmosphere. For example, in 2005 Senator Chuck Hagel—a staunch opponent of the Kyoto Protocol—introduced three legislative bills to spur the development of clean-energy technologies.[368] He stopped well

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[360] *Id.* at 30-31.

[361] *Id.* at 40-41.

[362] *Id.*

[363] *Id.* at 37 (quoting Senator Chuck Hagel, R-Neb).

[364] Senator James M. Inhofe (R-Okla), *Climate Change Update: Senate Floor Statement* (Jan. 4, 2005) (quoting from Senate floor statement of July 28, 2003), http://Inhofe.senate.gov/pressreleases/climateupdate.htm (visited Feb. 11, 2007).

[365] BROWN, *supra* note 359, at 33 (describing "an industry coalition of oil companies, electric utilities, automobile manufacturers, and farm groups . . . [that] launched a multi-million-dollar advertising campaign to generate public opposition to a Kyoto treaty").

[366] *See* Competitive Enterprise Institute, *We Call It Life* (showing clip of "Energy," a "60-second television spot[] [to be aired from May 18 to May 28, 2006] focusing on the alleged global warming crisis and the calls by some environmental groups and politicians for reduced energy use"), http://streams.cei.org/ (visited May 25, 2006).

[367] *Id.*

[368] *See* Amanda Griscom Little, *The Chuck Stops Here: An Interview with Senator Chuck Hagel, Republican from Nebraska, on His New Climate Bills*, GRIST, Mar. 2005,

short of endorsing mandatory emission caps, however, relying instead upon voluntary public-private partnerships and upon incentives to industry.[369] Similarly, commenting on the release of *Climate Change 2007,*[370] the Bush administration embraced the report, but indicated that it would continue to rely primarily upon voluntary methods to address the problem.[371] Also promoting voluntary efforts, Wal-Mart launched a broad sustainability campaign in 2006. Among other things, the effort seeks to double the efficiency of its vehicle fleet in ten years, and to reduce the energy use in its stores by thirty percent.[372]

Some have gone even farther, seeking mandatory regulation of atmospheric pollution contributing to climate change. For example, some politicians have called for the prompt enactment of mandatory caps on U.S. greenhouse gas emissions.[373] Increasingly, industry has supported such calls. In a move that would have been largely unthinkable just a decade ago, a coalition of prominent businesses and environmental groups—the United States Climate Action Partnership—has recently called on the federal government to quickly enact strong national legislation to require significant reductions of greenhouse gas emissions.[374]

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http://www.grist.org/news/maindish/2005/03/01/hagel/ (visited Feb. 11, 2007). With respect to his position on climate change treaties, the Senator asserted,

> My position has been very consistent. In 1997, I introduced the Byrd-Hagel Resolution, and if you read that it says two things: the Senate would not ratify any climate-change treaty that does not include developing nations and does harm to the U.S. economy. So I'm right where I was in 1997, and that's reflected in the legislation that I introduced. I've always said that climate change is a cycle of the world. We've always had extreme swings in climate, long before there was a combustion engine or a great population of human beings in the world.

Id.

[369] *Id.*

[370] *See supra* notes and accompanying text.

[371] *See* Dean Scott & Larry Speer, *Bush Administration Embraces IPCC Findings but Resists Call for Capping U.S. Emissions,* 38 BNA ENVT'L REPORTER, Feb. 9, 2007.

[372] *See* Marc Gunther, *The Green Machine,* FORTUNE MAGAZINE, July 31, 2006.

[373] *See, e.g.,* Dean Scott, *Climate Change: Pelosi Says House Will Not Wait for Bush, Will Pass "Groundbreaking" Legislation*, 38 BNA ENV'T REPORTER, Jan. 26, 2007; Dean Scott, *Senators Say Consensus Building for Bill With Mandatory Caps on Greenhouse Gases*, ENV'T REPORTER, Feb. 2, 2007.*See also Climate Change, Congressional Research Service Comparison of Key Provisions of Greenhouse Gas Reduction Bills Introduced in 110th Congress,* BNA DAILY ENV'T REP'T, Jan. 31, 2007 (describing four congressional proposals introduced in the 110th Congress that would set an absolute cap on specified greenhouse gas emissions).

[374] *See* United States Climate Action Partnership, http://www.us-cap.org/ (visited Feb. 11, 2007). The Partnership is a group of businesses and environmental organizations, including Alcoa, BP

Undoubtedly, a constellation of factors has prompted this growing acceptance of mandatory legislation. Foremost among them, perhaps, is the new scientific learning about the threats and causes of climate change—embodied in prominent reports such as *Climate Change 2001* and *Climate Change 2007*.[375] As the knowledge base increases, society's reaction may change from that of "environmental cynicism" to that of "environmental connectivity."[376] As a result, the *new nuisance* has evolved in the context of global warming. Through offensive nuisance law suits, courts have increasingly been asked to expand the conventional wisdom on cause and effect.[377] As an attorney from one prominent law firm has surmised, "successful common law nuisance suits can spur legislative action. . . . Today's global warming nuisance suits could have the effect of encouraging Congress to adopt more comprehensive legislative solutions a few years from now."[378]

CONCLUSION: TOWARD THE THIRD INDUSTRIAL REVOLUTION?

Lucas purported to establish a new bright-line threshold of takings liability, triggered when regulation deprives landowners of all economically beneficial use.[379] Ironically, however, the "new nuisance" defense has proved to be more enduring than the rule. As one commentator stated, what Justice Scalia "hoped to serve as a *per se* takings rule proves, in its practical operation, to work more often as a *per se* no takings rule."[380] As a result of the new rule and defense of *Lucas,* courts have placed a renewed emphasis upon a broad balancing of public and private interests. Drawing upon the long tradition of nuisance law, courts weigh factors as concrete as market value and as ephemeral as happiness.[381] As an opinion from the D.C. Circuit stated, courts have returned to a

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America, Catepillar, inc., Duke Energy, DuPont, Environmental Defense, FPL Group, General Electric, Lehman Brothers, Natural Resources Defense Council, Pew Center on Global Climate Change, PG&E Corporation, PNM Resources, and the World Resources Institute. *Id.*

[375] *See supra* notes and accompanying text.

[376] *See supra* Parts II.A and IV.B.

[377] *See supra* Part V.C.2.

[378] Pidot, *supra* note, at 5 (2006) (observing that "a good deal of the modern federal environmental law adopted in the 1970s was enacted in response to rulings in common law suits brought to redress environmental injuries").

[379] *See supra* note.

[380] *See supra* note and accompanying text.

[381] *See, e.g.,* Travis v. Moore, 377 So.2d 609 (Miss. 1979) (describing nuisance in terms of impairment to neighborhood happiness, in context of undertaking establishments); San Diego v. Carlstrom, 16 Cal. Rptr. 667 (Cal. App. 1961) (describing nuisance in terms of "unnecessary and

"gestalt approach" that evaluates both the purpose and desired effect of governmental regulation.[382]

Perhaps the broader lesson from *Lucas* and its progeny is that the public interest—and its supporting regulations—cannot be circumscribed by a single measure as narrow as the economic impact of regulation upon landowners. Rather, as recognized long ago by *Penn Central,* economic impact is but one factor that societies should consider in a just and equitable distribution of the burdens of modern life.[383] Courts should identify all of the impacts of an action—in accordance with changed circumstances and new learning—in determining whether such action may be regulated without compensation in the name of the public interest. In this context, the reincorporation of nuisance into the law of regulatory takings levels the playing field between public and private interests. By examining cause-effect relationships, nuisance is capable of defusing the modern one-sided rhetoric of rights that portrays landowners as the victims of government regulators, even when those landowners generate negative externalities that spill over into neighboring communities.

The legacy of *Lucas* may go far beyond the context of regulatory takings in particular, and litigation in general. Instead, innovators are beginning to see more potential profit in fighting global warming than in fighting the government's increasingly-likely regulation of global warming. The first and second industrial revolutions brought new technologies to England and the United States, respectively,[384]—including the "spinning Jenny," the "water frame," the steam engine, and the locomotive.[385] Some claim that a "third industrial revolution" may now be underway, fueled by the development of technological solutions to increasingly prominent environmental challenges such as providing sustainable energy and addressing global warming.[386] Banking on this entrepreneurial spirit, British billionaire Richard Branson and former vice president Al Gore announced a contest to remove at least one billion tons of carbon dioxide annually from the

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extreme danger to the life, property and happiness of others); 17 Maine Revised Statutes § 2802 (defining nuisance to include the discarding of motor vehicles in a manner "injurious to the comfort and happiness of individuals and the public").

[382] *See supra* note and accompanying text.

[383] *See supra* note.

[384] *See supra* Part III.A.

[385] *See* Schools History, *Inventions that Fueled the Industrial Revolution*, http://www.schoolshistory.org.uk/IndustrialRevolution/inventions.htm (last visited Feb. 13, 2007).

[386] *See* Moises Velasquez-Manoff, *Unions See Greenbacks in "Green" Future: Organized Labor is Joining Forces with Environmentalists to Push for an Eco-Friendly Economy,* CHRISTIAN SCIENCE MONITOR, Jan. 25, 2007.

atmosphere.[387] As a prize, Branson has offered twenty-five million dollars.[388] Looking at the related potential for developing clean, renewable energy sources to achieve national energy independence, one analysis by environmental and labor organizations predicts that an annual investment of thirty billion dollars for ten years would trigger the creation of 3.3 million jobs and a $1.4 million increase in the gross domestic product.[389] In at least a small measure, perhaps these developments can be attributed to *Lucas's* unintentional reinvigoration of nuisance law, with its concomitant examination of the actions that threaten critical environmental resources.

[387] Kevin Sullivan, *$25 Million Offered in Climate Challenge: Tycoon Hopes to Spur Milestone Research,* WASHINGTON POST, at A13, Feb. 10, 2007 (discussing February 8, 2007 announcement by chief of Virgin Atlantic Airlines and Virgin Trains).

[388] *Id.*

[389] Velasquez-Manoff, *supra* note 386.